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RESPONSE REQUESTED

ORIGINAL (4)

ORIGINAL

No. 98-5021

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHAEL W. RIGGS,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

APPENDICES TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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155 pp

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Fourth Appellate District, Division Two, No. E019488
S067322

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

MICHAEL WAYNE RIGGS, Appellant

Appellant's petition for review DENIED.

GEORGE

Chief Justice

APPENDIX B

NOT FOR PUBLICATION

APPENDIX B

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,	
Plaintiff and Respondent,	E019488
v.	(Super.Ct.No. CR66167)
MICHAEL WAYNE RIGGS,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. Dennis McConaghy, Judge. (Judge of the Municipal Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

James L. Crowder, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, and Craig S. Nelson, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of petty theft with a prior (Pen. Code, § 666)[1] and possession of a hypodermic syringe (Bus. & Prof. Code, § 4149). The court found true four allegations that defendant had served prior prison terms within the meaning of section 667.5, subdivision (b) and four allegations that defendant had received serious and/or violent felony convictions under section 667, subdivisions (c) and (e) and section 1170.12, subdivision (c). The court sentenced defendant to 25 years to life for the petty theft with a prior conviction and to a concurrent 90-day term in county jail for count 2. The court struck the prior prison term enhancements. The court gave defendant credit of 411 days for actual presentence custody but limited presentence conduct credits to 61 days under section 2933.1.

On appeal, defendant contends that the prosecutor committed prejudicial misconduct in his closing argument to the jury, defendant's life sentence constitutes cruel and unusual punishment under both the California and federal Constitutions and the trial court erred in determining presentence conduct credits. We affirm the judgment but order it amended to reflect the correct amount of presentence conduct credits.

FACTS

Ann Lopez, an employee of Albertsons Supermarket in Banning, was working in one of the aisles when she noticed defendant standing in the vitamin section. Lopez saw defendant take a bottle of vitamins from a display and place it in his jacket pocket. As

[1] All further statutory references will be to the Penal Code unless otherwise indicated.

Lopez watched him, defendant walked out of the store without paying for the vitamins. Lopez notified another employee who accompanied Lopez as she followed defendant out the store. Lopez asked defendant to return the vitamins, but defendant did not respond and kept walking. Defendant eventually turned and looked at Lopez and began running away. Several other male employees chased defendant across the parking lot. At one point, defendant stopped and faced an employee. He told the employee that he had a knife and swung his right hand as if he had a knife. The employee realized there was no knife in defendant's hand, and defendant continued running. Just before several employees caught defendant, he threw the bottle of vitamins onto the ground. Defendant asked the employees if he could work for the merchandise. As police were searching defendant, they found a hypodermic syringe in his sock.

DISCUSSION

I

Prosecutorial Misconduct

Defendant contends that the prosecutor committed prejudicial error during his closing argument to the jury. On appeal, defendant objects to the following statements by the prosecutor: "Why are we here? Why does a person fight a traffic ticket? Well, he may fight it because he doesn't believe he is guilty. He may also fight it because he thinks the fine is too high, because he thinks he will get a reduction or some leniency if he pushes it to the maximum. I disagree with that law. There is no way I'm going to pay that ticket. These are things you can't speculate on. The prosecutor must think he has a

good case, that's why he pushed it this far. Or the defendant thinks he has a good case, that is why he pushed it this far. That is not something for you to speculate about."

Defendant also objects to the continuing comments: "Well, those are the two duties that you are here to perform, and you know we're here today if you think about it because Mr. Riggs just kept on pushing, you know, he just kept on pushing. He was asked -- first, he goes into the store where people are running a business trying to make a living. Young people, you know, making an hourly wage. It is not as if they're there to risk their life for [a] $20 bottle of pills. And when he steals it and he walks out of the store he pushes them. They say, just come back, we don't want to get involved in this, but he keeps pushing them. I'm going to violate the law, and I bet you if I push this envelope far enough you guys are going to let me go.

"So what does he do? He runs and they chase him. So he says he has a knife and he spins around like he is going to slash them. Then what does he do when they asked him to come back to the store after they caught up to the guy? He won't cooperate. They have to put handcuffs on him and take him back to the store. Only at that point does he realize that their desire to be good employees and follow the law is stronger than his desire to disobey the law.

"We're in [a] similar situation here as jurors. You are sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills like the employees could have blown it . . . off. It is kind of a test. He is pushing it to the limit. Maybe if I take it

this far, maybe people out there won't think at this time is important [*sic*] and they won't vote guilty.

"But it is important he is testing will the law be enforced? [*sic*] Will my lawlessness be tolerated by the society. And the answer to that question must be no, and the answer to the question of guilt in this case must be yes."

Defense counsel objected to the last portion of the prosecutor's argument. Defense counsel stated that the arguments concerning analogies to traffic tickets were objectionable but he did not object at that point in the argument because he thought that the prosecutor would move on. However, once the prosecutor returned to those remarks, defense counsel objected and stated that the prosecutor was improperly commenting on the exercise of defendant's constitutional right to a jury trial and that striking the statements and admonishing the jury would not cure the prejudice. The Attorney General asserts that defendant may not object to the first portion of the argument on appeal because defense counsel did not object at the time; however, defense counsel's objection did encompass the prior comments, and defense counsel explained that he did not think that striking the comments and admonishing the jury would cure the harm. Therefore, defendant did not waive this particular portion of the issue on appeal.

A defendant has a constitutional right to a trial by jury under both the federal and state Constitutions. (*People* v. *Trejo* (1990) 217 Cal.App.3d 1026, 1029.) A prosecutor may not make adverse comments on a defendant's exercise of a constitutional right. (Cf.

Griffin v. *California* (1965) 380 U.S. 609, 613 [85 S.Ct. 1229, 14 L.Ed.2d 106]; *People* v. *Crandell* (1988) 46 Cal.3d 833, 877-878.)

Although the prosecutor's comments were an improper comment on defendant's exercise of his right to a trial by jury, the trial court admonished the jury. "All right, ladies and gentlemen, before we have the defense counsel's closing argument I just want to make sure that nobody is led astray. There was a reference, actually the last paragraph of the argument was we're in [a] similar situation as jurors. You're sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills, like employees could have blown it off.

"If any of the jurors interpreted the following, anything after that, as meaning that the defendant should not or does not have a right to go to trial, period, that reference should not have been, I believe, it wasn't intended to mean that the defendant does not have a right to go to trial. But you are not to interpret that he did not have a right to go to trial, or the fact that he went to trial is any evidence of his guilt. As I say I don't think it was intended that way, but just if reading it I just want to make sure that you didn't take it that way. Okay, counsel, you may proceed."

The trial court's prompt admonishment informed the jury that defendant had a constitutional right to trial by jury and that the jury was not to consider that fact in any way in determining whether defendant was guilty of the offenses. This admonishment adequately corrected any harm created by the prosecutor's statements. (*People* v. *Gionis*

(1995) 9 Cal.4th 1196, 1217.) In fact, after the verdicts were returned, a juror questioned why such a small case went to jury trial, but reaffirmed that he understood that defendant had a constitutional right to a jury trial. The error was harmless beyond a reasonable doubt.

II

Cruel and Unusual Punishment

Defendant contends that his sentence of 25 years to life was cruel and unusual punishment under both the federal and state Constitutions because the sentence is disproportionate to the offense. The Attorney General contends that defendant waived this issue because he did not bring a motion on these grounds. However, defendant did ask the court to exercise its discretion to dismiss or strike the priors under several grounds including the proportionality of the sentence, although defendant did not use the term, "cruel and unusual punishment."

The Eight Amendment to the United States Constitution prohibits cruel and unusual punishment which includes sentences that are disproportionate to the crime committed. (*Solem* v. *Helm* (1983) 463 U.S. 277, 284, 287 [103 S.Ct. 3001, 77 L.Ed.2d 637].) In determining whether a sentence is proportionate under the federal Constitution, we examine the gravity of the offense and the harshness of the penalty, compare the sentences imposed on other criminals in the same jurisdiction and compare the sentences imposed for commission of the same crime in other jurisdictions. (*Id.* at pp. 290-291.) In

applying this test, we grant substantial deference to the authority that the Legislature possesses in determining punishment for crimes. (*Id.* at p. 290.)

As for the first prong, defendant contends that his sentence of 25 years to life is too harsh a penalty for the theft of a bottle of vitamins worth approximately $20. We agree with this statement; however, defendant received his punishment for his recidivism and not just his current offense. (*People* v. *Cooper* (1996) 43 Cal.App.4th 815, 825.)

The Legislature has designated the term of 25 years to life for a recidivist who has received two or more prior serious or violent felony convictions and who receives a subsequent felony conviction. In punishing recidivists, the government is interested in more than punishment for the current offense. The state has an interest in dealing more harshly with those who commit repeated criminal acts thereby showing that they are incapable of conforming to society's norms. (*Rummel* v. *Estelle* (1980) 445 U.S. 263, 276 [100 S.Ct. 1133, 63 L.Ed.2d 382].) "The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the

necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Id.* at pp. 284-285.)

Defendant compares his crime with "more serious crimes" in California. He refers to the sentence of 26 years to life for a first degree murder conviction with use of a deadly weapon with parole eligibility in 17 years and 4 months. Defendant will be serving 25 years to life with parole eligibility in approximately 20 years. Defendant argues that he does not pose a greater danger to society than a first degree murderer does. A comparison of defendant's punishment for his recidivism to the punishment for others who have been committed for "more serious crimes" but who are not repeat felons does not aid our discussion. (*People* v. *Ayon* (1996) 46 Cal.App.4th 385, 400.) We note that defendant's prior strike convictions were for serious and/or violent felonies. Although defendant's current conviction is not for a violent felony, a state's interest in deterring criminal conduct is not always determined by the presence or absence of violence. (*People* v. *Cooper, supra*, 43 Cal.App.4th at p. 826.)

Defendant next compares his sentences with the recidivist statues in other jurisdictions. He notes that in some jurisdictions the current felony must be an aggravated one, some states apply varying punishment depending upon the severity of the current crime, other states require the service of prior prison terms for the prior felonies or require more prior felony convictions, other states allow the court wider jurisdiction in the application of their recidivist statutes, some states give the prosecution more

discretion and some states allow wash-out periods for prior felony convictions. Our review of the recidivist statutes in other jurisdictions indicates that at least 40 states have some form of punishment for recidivists.[2] It appears that California's three strikes law is part of a nationwide pattern of recidivist statutes calling for substantially increased sentences for repeat offenders. The fact that a sentence is mandatory does not necessarily render it cruel and unusual. (*Harmelin* v. *Michigan* (1991) 501 U.S. 957, 994-995 [111 S.Ct. 2680, 175 L.Ed.2d 836.].) Although there may be some minor differences in the recidivist statutes, California's statute does not appear to be substantially more

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2 Recidivist statutes are currently in effect in at least Alabama (Ala. Code, § 13A-5-9), Arizona (Ariz. Rev. Stat. Ann., § 13-604), Arkansas (Ark. Code Ann., § 5-4-501), Colorado (Colo. Rev. Stat., § 16-13-101), Connecticut (Conn. Gen. Stat. Ann., § 53a-40), Delaware (Del. Code Ann., tit. 11, § 4214), Florida (Fla. Stat. Ann., § 775.084), Georgia (Ga. Code Ann., § 17-10-7), Hawaii (Haw. Rev. Stat., § 706-606.5), Idaho (Idaho Code, § 19-2514), Illinois (Ill. Ann. Stat., ch. 720, § 33B-1), Indiana (Ind. Code, § 35-50-2-8.5), Kansas (Kan. Stat. Ann., § 21-4504), Kentucky (Ky. Rev. Stat. Ann., § 532.080), Louisiana (La. Rev. Stat. Ann., § 15:529.1), Maryland (Md. Ann. Code, art. 27, § 643B), Michigan (Mich. Comp. Laws Ann., § 769.12), Mississippi (Miss. Code Ann., § 99-19-83), Missouri (Mo. Ann. Stat., § 558.016), Montana (Mont. Code Ann., § 46-18-501), Nebraska (Neb. Rev. Stat., § 29-2221), Nevada (Nev. Rev. Stat., § 207.010), New Hampshire (N.H. Stat. Ann., § 651:6), New Jersey (N.J. Stat. Ann., §§ 2C:44-3, 2C:43-7), New York (N.Y. Penal Law, § 70.08), North Carolina (N.C. Gen. Stat. §§ 14-7.1, 14-7.6), North Dakota (N.D. Cent. Code, § 12.1-32-09), Oklahoma (Okla. Stat., tit. 21, § 51), Oregon (Ore. Rev. Stat., § 161.725), Rhode Island (R.I. Gen. Laws, § 12-19-21), South Carolina (S.C. Code Ann., § 17-25-45), South Dakota (S.D. Codified Laws, § 22-7-8), Tennessee (Tenn. Code Ann., §§ 40-35-106, 40-35-107, 40-35-108), Texas (Tex. Penal Code Ann., § 12.42), Utah (Utah Code, § 76-8-1001), Vermont (Vt. Stat. Ann., tit. 13, § 11), Virginia (Va. Code Ann., § 19.2-297.1), Washington (Wash. Rev. Code Ann., § 9.92.090), West Virginia (W. Va. Code, § 61-11-18) and Wyoming (Wyo. Stat., § 6-10-201).

burdensome than others. Thus, defendant has not met his burden with respect to the third prong.

California's provision regarding cruel and unusual punishment is found in the California Constitution under article I, section 17. The prohibition against cruel and unusual punishment in California is violated if the sentence is grossly disproportionate to the offense for which it is imposed. We examine the nature of the offense and the offender with regard to the degree of danger they present to society, compare the penalty in this case with other penalties in California for more serious crimes and compare the penalty for this same offense in different jurisdictions with the one imposed in this case. (*People* v. *Dillon* (1983) 34 Cal.3d 441, 477-478; *In re Lynch* (1972) 8 Cal.3d 410, 426-427.) Defendant has the burden of establishing that his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (*People* v. *Ayon, supra*, 46 Cal.App.4th at p. 399.)

"First, the crime itself must be reviewed, both in the abstract and in view of the totality of the circumstances surrounding its commission, 'including such factors as its motive, the way it was committed, the extent of defendant's involvement, and the consequences of his acts . . . ,' to determine whether a particular punishment is grossly disproportionate to the crime for which it is inflicted. [Citations.] Secondly, the court must consider 'the nature of the offender' and inquire 'whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his

age, prior criminality, personal characteristics, and state of mind.' [Citations.]" (*People* v. *Weddle* (1991) 1 Cal.App.4th 1190, 1197-1198, fns. omitted.)

As previously discussed, defendant is being punished for his recidivism, and the state has a great interest in punishing criminals for recidivist behavior. Although his current offense is not violent, society's interest is not always determined by the violence of the offense. (*People* v. *Cooper, supra*, 43 Cal.App.4th at p. 826.) As for his current offense, it was a petty theft motivated by homelessness and hunger; however, he did threaten violence to store employees. Defendant was in his mid-40's at the time he committed the current offense. Defendant has a lengthy list of prior convictions including four counts of second degree robbery and a vehicle theft. Since 1983, defendant has spent the majority of his life in custody. Defendant does appear to have a problem with substance abuse. His substance abuse was apparently precipitated by the death of his young son.

By committing another felony after having been convicted of numerous prior serious and/or violent felonies, defendant has proven that he cannot conform to society's rules. Prior incarceration has failed to dissuade defendant from his criminal activities. Our discussion of the last two prongs under the federal Constitution applies equally to the California Constitution. We therefore determine that defendant's punishment for his recidivist behavior was not grossly disproportionate to the offense and his sentence under the three strikes law does not constitute cruel and unusual punishment under the California or federal Constitutions.

III

Presentence Custody Conduct Credit

The court limited the presentence conduct credits given to defendant on the basis of section 2933.1. That section limits presentence conduct credit to 15% for people convicted of certain violent felonies which are listed in section 667.5. Subdivision (c)(7) of section 667.5 lists "any felony punishable by death or imprisonment in the state prison for life" as a violent felony. The court below determined that defendant's sentence of 25 years to life qualified him for application of section 2933.1. The Attorney General concedes that defendant is entitled to additional conduct credits; however, the Attorney General cites to an incorrect case in support of this concession. In *People* v. *Henson* (1997) 57 Cal.App.4th 1380, this court held that the sentence of 25 years to life imposed upon a defendant under the three strikes law does not qualify as "any felony punishable by death or imprisonment in the state prison for life" as defined in section 667.5, subdivision (c)(7). Therefore, this court held that section 2933.1's limitations on presentence conduct credit does not apply to a person's sentence under the three strikes law unless that person's current conviction is for one of the listed violent felonies. Defendant's current offense is for petty theft with a prior which is not one of the listed violent felonies; therefore, the court erred in applying section 2933.1 to defendant. Both defendant and the Attorney General agree that he is entitled to a total of 204 days of conduct credits rather than the 61 days which the court awarded to him.

DISPOSITION

The judgment is affirmed; however, the trial court is ordered to amend the abstract of judgment to award defendant a total of 204 days of presentence conduct credit and to forward a copy of the amended abstract of judgment to the Department of Corrections.

NOT FOR PUBLICATION

/s/ Ramirez
P. J.

We concur:

/s/ Ward
J.

/s/ Gaut
J.

A P P E N D I X C

APPENDIX C

§ 667. Habitual criminals; enhancement of sentence; amendment of section

(a)(1) In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.

(2) This subdivision shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. There is no requirement of prior incarceration or commitment for this subdivision to apply.

(3) The Legislature may increase the length of the enhancement of sentence provided in this subdivision by a statute passed by majority vote of each house thereof.

(4) As used in this * * * subdivision, "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

* * *(5) This subdivision * * * shall not apply to a person convicted of selling, furnishing, administering, or giving, or offering to sell, furnish, administer, or give to a minor any methamphetamine-related drug or any precursors of methamphetamine unless the prior conviction was for a serious felony described in subparagraph (24) of subdivision (c) of Section 1192.7.

(b) It is the intent of the Legislature in enacting

subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.

(c) Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shall not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is

physically placed in the state prison.

(6) If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e).

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for

purposes of subdivisions (b) to (i), inclusive:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.

(B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony.

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions

Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.

(e) For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictons as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:

(i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.

(ii) Imprisonment in the state prison for 25 years.

(iii) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) shall be served consecutive to any other term of imprisonment for

which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(f)(1). Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has a prior felony conviction as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(g) Prior felony convictions shall not be used in plea bargaining as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (f).

(h) All references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on June 30,1993.

(i) If any provision of subdivisions (b) to (h), inclusive,

or the application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of those subdivisions which can be given effect without the invalid provision or application, and to this end the provisions of those subdivisions are severable.

(j) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors. *(Added by Initiative Measure, approved by the people, June 8, 1982. Amended by Stats. 1986, c. 85, § 1.5, urgency, eff. May 6, 1986; Stats. 1989, c. 1043, § 1; Stats. 1994, c. 12 (A.B.971), § 1, eff. March 7, 1994.)*

667.5. Prior prison terms; enhancement of prison terms for new offenses

Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:

(a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies specified in subdivision (c). However, no additional term shall be imposed under this subdivision for any prison time served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(c) For the purpose of this section, "violent felony" * * * means any of the following:

(1) Murder or voluntary manslaughter.

(2) Mayhem.

(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(6) Lewd acts on a child under the age of 14 years as defined in Section 288.

(7) Any felony punishable by death or imprisonment in the state prison for life.

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5, 12022.53, or 12022.55.

(9) Any robbery perpetrated in an inhabited dwelling house, vessel, as defined in Section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, an inhabited trailer coach, as defined in the Vehicle Code, or in the inhabited portion of any other building, wherein it is charged and proved

that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.

(10) Arson, in violation of subdivision (a) of Section 451.

(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(12) Attempted murder.

(13) A violation of Section 12308.

(14) Kidnapping, in violation of subdivision (b) of Section 207.

(15) Kidnapping, as punished in subdivision (b) of Section 208.

(16) Continuous sexual abuse of a child, in violation of Section 288.5.

(17) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a dangerous or deadly weapon as provided in subdivision (b) of Section 12022 in the commission of the carjacking.

(18) Any robbery of the first degree-punishable pursuant to subparagraph (A) of paragraph (1) of subdivision (a) of Section 213.

(19) A violation of Section 264.1.

The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of

violence against the person.

(d) For the purposes of this section, the defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody or until release on parole, whichever first occurs, including any time during which the defendant remains subject to reimprisonment for escape from custody or is reimprisoned on revocation of parole. The additional penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action for the new offense.

(e) The additional penalties provided for prior prison terms shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison.

(f) A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison if the defendant served one year or more in prison for the offense in the other jurisdiction. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law if the defendant served one year or more in prison for the offense in the other jurisdiction.

(g) A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other

crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration.

(h) Serving a prison term includes any confinement time in any state prison ,or federal penal institution as punishment for Commission of an offense, including confinement in a hospital or other institution or facility credited as service of prison time in the jurisdiction of the confinement.

(i) For the purposes of this section, a commitment to the State Department of Mental Health as a mentally disordered sex offender following a conviction of a felony, which commitment exceeds one year in duration, shall be deemed a prior prison term.

(j) For the purposes of this section, when a person subject to the custody, control, and discipline of the Director of Corrections is incarcerated at a facility operated by the Department of the Youth Authority, that incarceration shall be deemed to be a term served in state prison.

(k) Notwithstanding subdivisions (d) and (g) or any other provision of law, where one of the new offenses is committed while the defendant is temporarily removed from prison pursuant to Section 2690 or while the defendant is transferred to a community facility pursuant to, Section 3416, 6253, or 6263, or while the defendant is on furlough pursuant to Section 6254, the defendant shall be subject to the full enhancements provided for in this section.

This subdivision shall not apply when a full, separate, and

consecutive term is imposed pursuant to any other provision of law. *(Added by Stats.1976, c. 1139, p. 5137 § 268, operative July 1, 1977. Amended by Stats.1977, c. 2, p. 4, § 1, eff. Dec. 16, 1976, operative July 1, 1977; Stats.1977 c. 165, p. 644, § 13, eff. June 29, 1977, operative July 1, 1977; Stats.1980, c. 587, p. 1596, § 3; Stats.1983, c. 229, § 1; Stats.1985, c. 402, § 1; Stats.1986, c. 645, § 1; Stats.1987, c. 611, § 1; Stats.1988, c. 70, § 1; Stats.1988, c. 89, § 1.5; Stats.1988, c. 432 § 1; Stats. 1988, c. 1484, § 1; Stats.1988, c. 1484 § 1.1; Stats. 1989, c. 1012, § 1; Stats.1990, c. 18 (A.B. 662), § 1; Stats.1991, c. 451 (A.B. 1393), § 1; Stats.1993, c. 162 (A.B. 112), § 3; Stats. 1993, c. 298 (A.B.31), § 2; Stats.1993, c. 610 (A.B. 6), § 10, eff. Oct. 1, 1993,' Stats.1993, c. 611 (S.B. 60), § 11, eff. Oct. 1, 1993; Stats.1994, c. 1188 (S.B. 59), § 6; Stats.1997 c. 371 (A.B. 793), § 1; Stats.1997 c. 504 (A.B.115), § 2.)*

§ 1170.12. Prior felony conviction; enhancement

(a) Notwithstanding any other provision of law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions, as defined in subdivision (b), the court shall adhere to each of the following:

(1) There shall not be an aggregate term limitation for purposes of consecutive sentencing for any subsequent felony conviction.

(2) Probation for the current offense shah not be granted, nor shall execution or imposition of the sentence be suspended for any prior offense.

(3) The length of time between the prior felony conviction and the current felony conviction shall not affect the imposition of sentence.

(4) There shall not be a commitment to any other facility other than the state prison. Diversion shall not be granted nor shall the defendant be eligible for commitment to the California Rehabilitation Center as provided in Article 2 (commencing with Section 3050) of Chapter 1 of Division 3 of the Welfare and Institutions Code.

(5) The total amount of credits awarded pursuant to Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not exceed one-fifth of the total term of imprisonment imposed and shall not accrue until the defendant is physically placed in the state prison.

(6) If there is a current conviction for more than one

felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to this section.

(7) If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.

(8) Any sentence imposed pursuant to this section will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law.

(b) Notwithstanding any other provision of law and for the purposes of this section, a prior conviction of a felony shall be defined as:

(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of this section shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. None of the following dispositions shall affect the determination that a prior conviction is a prior felony for purposes of this section:

(A) The suspension of imposition of judgment or sentence.

(B) The stay of execution of sentence.

(C) The commitment to the State Department of Health Services as a mentally disordered sex offender following a conviction of a felony.

(D) The commitment to the California Rehabilitation Center or any other facility whose function is rehabilitative diversion from the state prison.

(2) A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if:

(A) The juvenile was sixteen years of age or older at the time he or she committed the prior offense, and

(B) The prior offense is

(i) listed in subdivision (b) of Section 707 of the Welfare and Institutions Code, or

(ii) listed in this subdivision as a felony, and

(C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law, and

(D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in

subdivision (b) of Section 707 of the Welfare and Institutions Code.

(c) For purposes of this section, and in addition to any other enhancements or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction:

(1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.

(2)(A) If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of

(i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

(B) The indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall be served consecutive to

any other term of imprisonment for which a consecutive term may be imposed by law. Any other term imposed subsequent to any indeterminate term described in subparagraph (A) of paragraph (2) of this subdivision shall not be merged therein but shall commence at the time the person would otherwise have been released from prison.

(d)(1) Notwithstanding any other provision of law, this section shall be applied in every case in which a defendant has a prior felony conviction as defined in this section. The prosecuting attorney shall plead and prove each prior felony conviction except as provided in paragraph (2).

(2) The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

(e) Prior felony convictions shall not be used in plea bargaining, as defined in subdivision (b) of Section 1192.7. The prosecution shall plead and prove all known prior felony convictions and shall not enter into any agreement to strike or seek the dismissal of any prior felony conviction allegation except as provided in paragraph (2) of subdivision (d). *(Added by Initiative Measure (Prop. 184, § 1, approved Nov. 8, 1994).)*

APPENDIX D

APPENDIX D

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL WAYNE RIGGS, Defendant and Appellant.	Court of Appeal No. E019488 Super. Ct. No. CR66167

PETITION FOR REVIEW

OF A DECISION OF THE CALIFORNIA COURT OF APPEALS

FOURTH APPELLATE DISTRICT, DIVISION TWO

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By appointment of the
Court of Appeal under
Appellate Defenders, Inc.
independent-case system

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OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL WAYNE RIGGS, Defendant and Appellant.	)	Court of Appeal No. E019488 Super. Ct. No. CR66167

PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

MICHAEL WAYNE RIGGS, defendant and appellant, hereby petitions this Honorable Court for review in the above-entitled matter after decision rendered by the Court of Appeal of the State of California, Fourth Appellate district, Division Two, filed on December 17, 1997, affirming the lower court's judgment. A copy of the opinion of the Court of Appeal is attached hereto as an appendix.

ISSUE PRESENTED FOR REVIEW

Did the life sentence for the offense of petty theft constitute cruel and unusual punishment under both the California and federal constitutions?

REASON REVIEW SHOULD BE GRANTED

Review should be granted to resolve whether a life sentence which is imposed for the offense of petty theft amounts to cruel and unusual punishment under both the California and federal constitutions, an important issue of law.

STATEMENT OF THE CASE

This is a Petition for Review of the decision of the Court of Appeals, Fourth Appellate District, Division Two. There, appellant contended that the life sentence which was imposed for the offense of petty theft constituted cruel and unusual punishment under the federal constitution as well under the California Constitution.

In the trial court, in a two-count amended information, appellant was charged with petty theft with a prior conviction of robbery [Ct. 1, Pen. Code, § 666] and possession of a hypodermic syringe [Ct. 2, Bus. & Prof. Code, § 4149]. The amended information alleged that appellant had suffered three prior convictions within the meaning of Penal Code section 667, subdivisions (c) and (e) and Penal Code section 1170.12, subdivision (c) [prior strikes]. Four prior convictions were alleged within the meaning of Penal Code section 667.5, subdivision (b) [prior prison terms]. (CT 61-64.)[1]

[1]As used herein "CT" shall denote the Clerk's Transcript, and "RT," shall denote the Reporter's Transcript on appeal.

Trial was by jury, with the trial of the prior conviction allegations being bifurcated from the trial of the substantive offenses. (CT 196, RT 80.) The jury returned its verdicts finding appellant guilty of the substantive offenses. (CT 205-206.) Trial of the prior conviction allegations was by the court and the court found the allegations to be true. (CT 249A-250.)

At sentencing, an indeterminate sentence of 25 years to life was imposed for Count 1. A 90 day county jail sentence was imposed for Count 2 to be served concurrently. The three prior prison term enhancements were stricken. (CT 325.)

The Court of Appeal affirmed the conviction.

STATEMENT OF FACTS

The facts concerning the current offenses are fairly stated in the opinion of the Court of Appeal.

ARGUMENT

I

APPELLANT'S LIFE SENTENCE FOR THE OFFENSE OF PETTY THEFT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE CALIFORNIA AND FEDERAL CONSTITUTIONS

"'The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings." [Citation.] Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) A sentence that is "grossly disproportionate" to the offense for which it is imposed, violates both the California and United States constitutional prohibitions against cruel and unusual punishment. (*People* v. *Dillon* (1983) 34 Cal.3d 441, 478; *Gregg* v. *Georgia* (1976) 428 U.S. 153, 173; *Coker* v. *Georgia* (1977) 433 U.S. 584; U.S. Const., 8th Amend.; Cal. Const., art. I, Pen. Code, § 17.)[2]

In *Lynch*, this Court set forth three techniques for evaluating a punishment to determine whether it is disproportionate. The court must (1) examine the nature of

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[2]The federal circuit courts continue to apply a gross disproportionality test in determining Eighth Amendment challenges to punishments imposed for non-capital offenses. (See, e.g., *Cacoperdo* v. *Demosthenes* (9th Cir. 1994) 37 F.3d 504, 507-508; *United States* v. *Munoz* (1st Cir. 1994) 36 F.3d 1229, 1239; *United States* v. *Cupa-Guilen* (9th Cir. 1994) 34 F.3d 86, 864-865; *United States* v. *Lanier* (6th Cir. 1994) 33 F.3d 639, 665; *United States* v. *Frieberger* (8th Cir. 1994) 28 F.3d 916, 920; *United States* v. *Fisher* (5th Cir. 1994) 22 F.3d 574, 579-580; *United States* v. *Angulo-Lopez* (10th Cir. 1993) 7 F.3d 1506, 1510; *United States* v. *Sarbello* (3d Cir. 1993) 985 F.2d 716, 724; *McGruder* v. *Puckett* (5th Cir. 1992) 954 F.2d 313, 316-317.)

the offense and/or the offender, (2) compare the challenged penalty with punishment prescribed in California for other, more-serious offenses, and (3) compare the challenged penalty with punishments prescribed for the same offense in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at p. 425-427.)

For a holding of disproportionality, the court need not find the punishment disproportionate in all three respects. Rather, a finding of disproportionality based upon any of the *Lynch* criteria will suffice. (*People* v. *Dillon*, *supra*, 34 Cal.3d 441, 487 fn. 38; *In re Rodriguez* (1975) 14 Cal.3d 639, 656.) This does not mean, however, that each of the techniques must be considered in total isolation from the others. When the Court stated, in *Lynch*, that a statute's disparity with punishments in other states "is a *further* measure of its excessiveness" (*In re Lynch*, *supra*, 8 Cal.3d at p. 427, emphasis added), the suggestion is that the measure of disproportionality found in applying the several techniques would be cumulative.

A. <u>The penalty is disproportionate as applied to this offense and this offender</u>.

In *People* v. *Dillon*, *supra*, 34 Cal.3d 441, this Court found that, under the facts of its case, strict application of the felony-murder rule violated the prohibition against cruel and unusual punishment. In reaching this result, the Court looked to "'the nature of

the offense and/or the offender, *with particular regard to the degree of danger both present to society.*'" (*Id.*, at p. 479, emphasis added, quoting *In re Lynch*, *supra*, 8 Cal.3d at p. 425.)

With regard to the "nature of the offense," courts are to consider "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his act." (*People* v. *Dillon*, *supra*, 34 Cal.3d at p. 479.) As for the "nature of the offender," the appropriate inquiry is "whether the punishment is grossly disproportionate to defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Proper application of this analysis to the present case reveals that appellant's life sentence is "grossly disproportionate" both to the severity of his crime, and to the degree of danger he poses to society. In the present case, appellant was convicted of petty theft. Yet, appellant has been subjected to a life sentence for this offense. Such an offense is neither a violent nor a serious felony. (§§ 667.5, subd. (c), 1192.7, subd. (c).)

Petty theft is not among those offenses considered most dangerous to society. It is neither serious nor violent. An examination of the "totality of the circumstances surrounding the commission of the offense"

also underscores the nonserious, nonviolent nature of the offense.

While appellant's prior felony convictions arguably support some increased punishment for the current offense, the extreme punishment imposed cannot be rationalized under any credible system of criminal justice. (Cf. *In re Lynch*, *supra*, 8 Cal.3d at p. 425; *Faulkner* v. *State* (Alaska 1968) 445 P.2d 815, 818-819 [holding unconstitutionally disproportionate a 36-year sentence imposed on a 46-year-old man with a prior criminal record for a single spree of passing bad checks in one single day].)

B. <u>The penalty is disproportionate when compared with punishment prescribed in California for more serious offenses</u>.

In the present case, the Legislature has already determined that a conviction under Penal Code section 666 is not among the state's serious or violent felonies. (See §§ 667.5, subd. (b), 1192.7, subd. (c).) Under the Three Strikes Law, appellant is not eligible for parole until he serves 20.8 years, i.e., 80% of 26 years. (§ 667, subd. (c)(5).) By contrast, someone who commits a cold-blooded premeditated murder with a deadly weapon receives a maximum sentence of 26 years to life (§§ 190, subd. (a), and 12022, subd. (b)), and is eligible for parole in 17 years 4 months. (*In re Oluwa* (1989) 207 Cal.App.3d 439, 444-447.)

The question then becomes whether it is cruel or unusual to impose a sentence of 26 years to life without parole eligibility for 20.8 years in this case for having committed a petty theft. There is no doubt that the answer is yes. A person who commits premeditated murder with a deadly weapon is eligible for parole for that offense three years and 10 months sooner than appellant will be for this offense. Under no principled or defensible analysis can appellant be viewed as having posed a greater danger to society than such a murderer. As stated in *Dillon*, "a comparison of the challenged penalty with those prescribed in the same jurisdiction for more-serious crimes . . . is

particularly striking when a more serious crime is punished less severely than the offense in question, ..." (*People* v. *Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38 [emphasis omitted]; *In re Foss* (1974) 10 Cal.3d 910, 925-926.)

Application of the Three Strikes Law to persons convicted of relatively minor felonies only widens the disparity. Some trial courts have declined to apply the Three Strikes Law at all to third strikers convicted of such offenses and other felonies which have the option of being treated as misdemeanors under the provisions of section 17. (See, e.g., *People* v. *Trausch* (1995) 36 Cal.App.4th 1239, [trial court elected to reduce burglary involving theft of a cake to a misdemeanor, in order to avoid 25 years to life sentence otherwise mandated for third strike defendant; ruling affirmed on appeal], and *People* v. *Vessell* (1995) 36 Cal.App. 285 [trial court reduced the offense of inflicting corporal injury upon a cohabiting person to a misdemeanor and granted probation].)

C. <u>The penalty is disproportionate when compared with recidivist punishments in other jurisdictions</u>.

Some states' recidivist statutes, which appear on their face to be as draconian as California's, in actual practice, are not enforced as rigidly as is California's. In Idaho, a third conviction of any felony requires a prison term of not less than five years, and the term may extend to

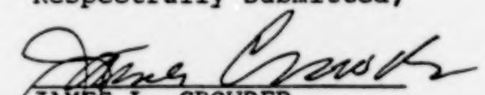
life. (Idaho Code, § 19-2514.) However, that statute differs from California's because the Idaho sentencing courts have wide discretion within those bounds (*State* v. *McPhie* (1983) 104 Idaho 652 [662 P.2d 233, 237]; *State* v. *Gauna* (1989) 117 Idaho 83 [785 P.2d 647, 652-653]), whereas the California sentencing courts have no function but to mathematically compute the defendant's sentence. More important, application of the recidivist statute is not mandatory; the Idaho court can sentence the defendant for the last-committed crime only, notwithstanding the prior record. (*State* v. *Holton* (App. 1991) 120 Idaho 112 [813 P.2d 923, 924].) Further, unlike the California statute, under which consecutive sentences are mandatory (Pen. Code, § 667, subd. (c)(6)-(8)), the Idaho courts retain discretion to sentence either consecutively or concurrently. (*State* v. *Brandt* (App. 1986) 110 Idaho 341 [715 P.2d 1011, 1016].) Finally, whereas 100 percent of the California minimum sentence must be served, an Idaho defendant may be considered for parole after service of one-third of the sentence. (*State* v. *Harrison* (App. 1985) 108 Idaho 324 [699 P.2d 30, 31].)

CONCLUSION

Review should be granted in this matter to resolve this important question.

Dated: January 13, 1998

Respectfully submitted,



JAMES L. CROWDER
Attorney for Appellant
By appointment of Court
of Appeal under the
Appellate Defenders, Inc.
independent-case system

ADDENDUM

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WAYNE RIGGS,

Defendant and Appellant.

E019488

(Super.Ct.No. CR66167)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis McConaghy, Judge. (Judge of the Municipal Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

James L. Crowder, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, and Craig S. Nelson, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of petty theft with a prior (Pen. Code, § 666)[1] and possession of a hypodermic syringe (Bus. & Prof. Code, § 4149). The court found true four allegations that defendant had served prior prison terms within the meaning of section 667.5, subdivision (b) and four allegations that defendant had received serious and/or violent felony convictions under section 667, subdivisions (c) and (e) and section 1170.12, subdivision (c). The court sentenced defendant to 25 years to life for the petty theft with a prior conviction and to a concurrent 90-day term in county jail for count 2. The court struck the prior prison term enhancements. The court gave defendant credit of 411 days for actual presentence custody but limited presentence conduct credits to 61 days under section 2933.1.

On appeal, defendant contends that the prosecutor committed prejudicial misconduct in his closing argument to the jury, defendant's life sentence constitutes cruel and unusual punishment under both the California and federal Constitutions and the trial court erred in determining presentence conduct credits. We affirm the judgment but order it amended to reflect the correct amount of presentence conduct credits.

FACTS

Ann Lopez, an employee of Albertsons Supermarket in Banning, was working in one of the aisles when she noticed defendant standing in the vitamin section. Lopez saw defendant take a bottle of vitamins from a display and place it in his jacket pocket. As

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[1] All further statutory references will be to the Penal Code unless otherwise indicated.

Lopez watched him, defendant walked out of the store without paying for the vitamins. Lopez notified another employee who accompanied Lopez as she followed defendant out the store. Lopez asked defendant to return the vitamins, but defendant did not respond and kept walking. Defendant eventually turned and looked at Lopez and began running away. Several other male employees chased defendant across the parking lot. At one point, defendant stopped and faced an employee. He told the employee that he had a knife and swung his right hand as if he had a knife. The employee realized there was no knife in defendant's hand, and defendant continued running. Just before several employees caught defendant, he threw the bottle of vitamins onto the ground. Defendant asked the employees if he could work for the merchandise. As police were searching defendant, they found a hypodermic syringe in his sock.

DISCUSSION

I

Prosecutorial Misconduct

Defendant contends that the prosecutor committed prejudicial error during his closing argument to the jury. On appeal, defendant objects to the following statements by the prosecutor: "Why are we here? Why does a person fight a traffic ticket? Well, he may fight it because he doesn't believe he is guilty. He may also fight it because he thinks the fine is too high, because he thinks he will get a reduction or some leniency if he pushes it to the maximum. I disagree with that law. There is no way I'm going to pay that ticket. These are things you can't speculate on. The prosecutor must think he has a

good case, that's why he pushed it this far. Or the defendant thinks he has a good case, that is why he pushed it this far. That is not something for you to speculate about."

Defendant also objects to the continuing comments: "Well, those are the two duties that you are here to perform, and you know we're here today if you think about it because Mr. Riggs just kept on pushing, you know, he just kept on pushing. He was asked -- first, he goes into the store where people are running a business trying to make a living. Young people, you know, making an hourly wage. It is not as if they're there to risk their life for [a] $20 bottle of pills. And when he steals it and he walks out of the store he pushes them. They say, just come back, we don't want to get involved in this, but he keeps pushing them. I'm going to violate the law, and I bet you if I push this envelope far enough you guys are going to let me go.

"So what does he do? He runs and they chase him. So he says he has a knife and he spins around like he is going to slash them. Then what does he do when they asked him to come back to the store after they caught up to the guy? He won't cooperate. They have to put handcuffs on him and take him back to the store. Only at that point does he realize that their desire to be good employees and follow the law is stronger than his desire to disobey the law.

"We're in [a] similar situation here as jurors. You are sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills like the employees could have blown it . . . off. It is kind of a test. He is pushing it to the limit. Maybe if I take it

this far, maybe people out there won't think at this time is important [*sic*] and they won't vote guilty.

"But it is important he is testing will the law be enforced? [*sic*] Will my lawlessness be tolerated by the society. And the answer to that question must be no, and the answer to the question of guilt in this case must be yes."

Defense counsel objected to the last portion of the prosecutor's argument. Defense counsel stated that the arguments concerning analogies to traffic tickets were objectionable but he did not object at that point in the argument because he thought that the prosecutor would move on. However, once the prosecutor returned to those remarks, defense counsel objected and stated that the prosecutor was improperly commenting on the exercise of defendant's constitutional right to a jury trial and that striking the statements and admonishing the jury would not cure the prejudice. The Attorney General asserts that defendant may not object to the first portion of the argument on appeal because defense counsel did not object at the time; however, defense counsel's objection did encompass the prior comments, and defense counsel explained that he did not think that striking the comments and admonishing the jury would cure the harm. Therefore, defendant did not waive this particular portion of the issue on appeal.

A defendant has a constitutional right to a trial by jury under both the federal and state Constitutions. (*People* v. *Trejo* (1990) 217 Cal.App.3d 1026, 1029.) A prosecutor may not make adverse comments on a defendant's exercise of a constitutional right. (Cf.

Griffin v. *California* (1965) 380 U.S. 609, 613 [85 S.Ct. 1229, 14 L.Ed.2d 106]; *People* v. *Crandell* (1988) 46 Cal.3d 833, 877-878.)

Although the prosecutor's comments were an improper comment on defendant's exercise of his right to a trial by jury, the trial court admonished the jury. "All right, ladies and gentlemen, before we have the defense counsel's closing argument I just want to make sure that nobody is led astray. There was a reference, actually the last paragraph of the argument was we're in [a] similar situation as jurors. You're sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills, like employees could have blown it off.

"If any of the jurors interpreted the following, anything after that, as meaning that the defendant should not or does not have a right to go to trial, period, that reference should not have been, I believe, it wasn't intended to mean that the defendant does not have a right to go to trial. But you are not to interpret that he did not have a right to go to trial, or the fact that he went to trial is any evidence of his guilt. As I say I don't think it was intended that way, but just if reading it I just want to make sure that you didn't take it that way. Okay, counsel, you may proceed."

The trial court's prompt admonishment informed the jury that defendant had a constitutional right to trial by jury and that the jury was not to consider that fact in any way in determining whether defendant was guilty of the offenses. This admonishment adequately corrected any harm created by the prosecutor's statements. (*People* v. *Gionis*

(1995) 9 Cal.4th 1196, 1217.) In fact, after the verdicts were returned, a juror questioned why such a small case went to jury trial, but reaffirmed that he understood that defendant had a constitutional right to a jury trial. The error was harmless beyond a reasonable doubt.

II

Cruel and Unusual Punishment

Defendant contends that his sentence of 25 years to life was cruel and unusual punishment under both the federal and state Constitutions because the sentence is disproportionate to the offense. The Attorney General contends that defendant waived this issue because he did not bring a motion on these grounds. However, defendant did ask the court to exercise its discretion to dismiss or strike the priors under several grounds including the proportionality of the sentence, although defendant did not use the term, "cruel and unusual punishment."

The Eight Amendment to the United States Constitution prohibits cruel and unusual punishment which includes sentences that are disproportionate to the crime committed. (*Solem* v. *Helm* (1983) 463 U.S. 277, 284, 287 [103 S.Ct. 3001, 77 L.Ed.2d 637].) In determining whether a sentence is proportionate under the federal Constitution, we examine the gravity of the offense and the harshness of the penalty, compare the sentences imposed on other criminals in the same jurisdiction and compare the sentences imposed for commission of the same crime in other jurisdictions. (*Id.* at pp. 290-291.) In

applying this test, we grant substantial deference to the authority that the Legislature possesses in determining punishment for crimes. (*Id.* at p. 290.)

As for the first prong, defendant contends that his sentence of 25 years to life is too harsh a penalty for the theft of a bottle of vitamins worth approximately $20. We agree with this statement; however, defendant received his punishment for his recidivism and not just his current offense. (*People* v. *Cooper* (1996) 43 Cal.App.4th 815, 825.)

The Legislature has designated the term of 25 years to life for a recidivist who has received two or more prior serious or violent felony convictions and who receives a subsequent felony conviction. In punishing recidivists, the government is interested in more than punishment for the current offense. The state has an interest in dealing more harshly with those who commit repeated criminal acts thereby showing that they are incapable of conforming to society's norms. (*Rummel* v. *Estelle* (1980) 445 U.S. 263, 276 [100 S.Ct. 1133, 63 L.Ed.2d 382].) "The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the

necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Id.* at pp. 284-285.)

Defendant compares his crime with "more serious crimes" in California. He refers to the sentence of 26 years to life for a first degree murder conviction with use of a deadly weapon with parole eligibility in 17 years and 4 months. Defendant will be serving 25 years to life with parole eligibility in approximately 20 years. Defendant argues that he does not pose a greater danger to society than a first degree murderer does. A comparison of defendant's punishment for his recidivism to the punishment for others who have been committed for "more serious crimes" but who are not repeat felons does not aid our discussion. (*People* v. *Ayon* (1996) 46 Cal.App.4th 385, 400.) We note that defendant's prior strike convictions were for serious and/or violent felonies. Although defendant's current conviction is not for a violent felony, a state's interest in deterring criminal conduct is not always determined by the presence or absence of violence. (*People* v. *Cooper, supra*, 43 Cal.App.4th at p. 826.)

Defendant next compares his sentences with the recidivist statues in other jurisdictions. He notes that in some jurisdictions the current felony must be an aggravated one, some states apply varying punishment depending upon the severity of the current crime, other states require the service of prior prison terms for the prior felonies or require more prior felony convictions, other states allow the court wider jurisdiction in the application of their recidivist statutes, some states give the prosecution more

discretion and some states allow wash-out periods for prior felony convictions. Our review of the recidivist statutes in other jurisdictions indicates that at least 40 states have some form of punishment for recidivists.[2] It appears that California's three strikes law is part of a nationwide pattern of recidivist statutes calling for substantially increased sentences for repeat offenders. The fact that a sentence is mandatory does not necessarily render it cruel and unusual. (*Harmelin* v. *Michigan* (1991) 501 U.S. 957, 994-995 [111 S.Ct. 2680, 175 L.Ed.2d 836.].) Although there may be some minor differences in the recidivist statutes, California's statute does not appear to be substantially more

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[2] Recidivist statutes are currently in effect in at least Alabama (Ala. Code, § 13A-5-9), Arizona (Ariz. Rev. Stat. Ann., § 13-604), Arkansas (Ark. Code Ann., § 5-4-501), Colorado (Colo. Rev. Stat., § 16-13-101), Connecticut (Conn. Gen. Stat. Ann., § 53a-40), Delaware (Del. Code Ann., tit. 11, § 4214), Florida (Fla. Stat. Ann., § 775.084), Georgia (Ga. Code Ann., § 17-10-7), Hawaii (Haw. Rev. Stat., § 706-606.5), Idaho (Idaho Code, § 19-2514), Illinois (Ill. Ann. Stat., ch.'720, § 33B-1), Indiana (Ind. Code, § 35-50-2-8.5), Kansas (Kan. Stat. Ann., § 21-4504), Kentucky (Ky. Rev. Stat. Ann., § 532.080), Louisiana (La. Rev. Stat. Ann., § 15:529.1), Maryland (Md. Ann. Code, art. 27, § 643B), Michigan (Mich. Comp. Laws Ann., § 769.12), Mississippi (Miss. Code Ann., § 99-19-83), Missouri (Mo. Ann. Stat., § 558.016), Montana (Mont. Code Ann., § 46-18-501), Nebraska (Neb. Rev. Stat., § 29-2221), Nevada (Nev. Rev. Stat., § 207.010), New Hampshire (N.H. Stat. Ann., § 651:6), New Jersey (N.J. Stat. Ann., §§ 2C:44-3, 2C:43-7), New York (N.Y. Penal Law, § 70.08), North Carolina (N.C. Gen. Stat. §§ 14-7.1, 14-7.6), North Dakota (N.D. Cent. Code, § 12.1-32-09), Oklahoma (Okla. Stat., tit. 21, § 51), Oregon (Ore. Rev. Stat., § 161.725), Rhode Island (R.I. Gen. Laws, § 12-19-21), South Carolina (S.C. Code Ann., § 17-25-45), South Dakota (S.D. Codified Laws, § 22-7-8), Tennessee (Tenn. Code Ann., §§ 40-35-106, 40-35-107, 40-35-108), Texas (Tex. Penal Code Ann., § 12.42), Utah (Utah Code, § 76-8-1001), Vermont (Vt. Stat. Ann., tit. 13, § 11), Virginia (Va. Code Ann., § 19.2-297.1), Washington (Wash. Rev. Code Ann., § 9.92.090), West Virginia (W. Va. Code, § 61-11-18) and Wyoming (Wyo. Stat., § 6-10-201).

burdensome than others. Thus, defendant has not met his burden with respect to the third prong.

California's provision regarding cruel and unusual punishment is found in the California Constitution under article I, section 17. The prohibition against cruel and unusual punishment in California is violated if the sentence is grossly disproportionate to the offense for which it is imposed. We examine the nature of the offense and the offender with regard to the degree of danger they present to society, compare the penalty in this case with other penalties in California for more serious crimes and compare the penalty for this same offense in different jurisdictions with the one imposed in this case. (*People* v. *Dillon* (1983) 34 Cal.3d 441, 477-478; *In.re Lynch* (1972) 8 Cal.3d 410, 426-427.) Defendant has the burden of establishing that his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (*People* v. *Ayon*, *supra*, 46 Cal.App.4th at p. 399.)

"First, the crime itself must be reviewed, both in the abstract and in view of the totality of the circumstances surrounding its commission, 'including such factors as its motive, the way it was committed, the extent of defendant's involvement, and the consequences of his acts . . . ,' to determine whether a particular punishment is grossly disproportionate to the crime for which it is inflicted. [Citations.] Secondly, the court must consider 'the nature of the offender' and inquire 'whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his

age, prior criminality, personal characteristics, and state of mind.' [Citations.]" (*People* v. *Weddle* (1991) 1 Cal.App.4th 1190, 1197-1198, fns. omitted.)

As previously discussed, defendant is being punished for his recidivism, and the state has a great interest in punishing criminals for recidivist behavior. Although his current offense is not violent, society's interest is not always determined by the violence of the offense. (*People* v. *Cooper*, *supra*, 43 Cal.App.4th at p. 826.) As for his current offense, it was a petty theft motivated by homelessness and hunger; however, he did threaten violence to store employees. Defendant was in his mid-40's at the time he committed the current offense. Defendant has a lengthy list of prior convictions including four counts of second degree robbery and a vehicle theft. Since 1983, defendant has spent the majority of his life in custody. Defendant does appear to have a problem with substance abuse. His substance abuse was apparently precipitated by the death of his young son.

By committing another felony after having been convicted of numerous prior serious and/or violent felonies, defendant has proven that he cannot conform to society's rules. Prior incarceration has failed to dissuade defendant from his criminal activities. Our discussion of the last two prongs under the federal Constitution applies equally to the California Constitution. We therefore determine that defendant's punishment for his recidivist behavior was not grossly disproportionate to the offense and his sentence under the three strikes law does not constitute cruel and unusual punishment under the California or federal Constitutions.

III

Presentence Custody Conduct Credit

The court limited the presentence conduct credits given to defendant on the basis of section 2933.1. That section limits presentence conduct credit to 15% for people convicted of certain violent felonies which are listed in section 667.5. Subdivision (c)(7) of section 667.5 lists "any felony punishable by death or imprisonment in the state prison for life" as a violent felony. The court below determined that defendant's sentence of 25 years to life qualified him for application of section 2933.1. The Attorney General concedes that defendant is entitled to additional conduct credits; however, the Attorney General cites to an incorrect case in support of this concession. In *People* v. *Henson* (1997) 57 Cal.App.4th 1380, this court held that the sentence of 25 years to life imposed upon a defendant under the three strikes law does not qualify as "any felony punishable by death or imprisonment in the state prison for life" as defined in section 667.5, subdivision (c)(7). Therefore, this court held that section 2933.1's limitations on presentence conduct credit does not apply to a person's sentence under the three strikes law unless that person's current conviction is for one of the listed violent felonies. Defendant's current offense is for petty theft with a prior which is not one of the listed violent felonies; therefore, the court erred in applying section 2933.1 to defendant. Both defendant and the Attorney General agree that he is entitled to a total of 204 days of conduct credits rather than the 61 days which the court awarded to him.

DISPOSITION

The judgment is affirmed; however, the trial court is ordered to amend the abstract of judgment to award defendant a total of 204 days of presentence conduct credit and to forward a copy of the amended abstract of judgment to the Department of Corrections.

NOT FOR PUBLICATION

/s/ Ramirez
P. J.

We concur:

/s/ Ward
J.

/s/ Gaut
J.

DECLARATION OF SERVICE

I, undersigned say: I am over 18 years of age, employed in the County of Santa Barbara, California, in which county the with-in mentioned delivery occurred, and not a party to the subject cause. My business address is 140 East Figueroa Street, Santa Barbara, California. I served the **Appellant's Petition for Review** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Santa Barbara, California, on January ___, 1998.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 13, 1998, at Santa Barbara, California.

JAMES L. CROWDER

A P P E N D I X E

APPENDIX E

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL WAYNE RIGGS, Defendant and Appellant.	Court of Appeal No. E019488 Super. Ct. No. CR66167

<u>APPELLANT'S PRO PER SUPPLEMENTAL PETITION FOR REVIEW</u>

OF A DECISION OF THE CALIFORNIA COURT OF APPEALS

FOURTH APPELLATE DISTRICT, DIVISION TWO

Michael W. Riggs
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Blythe, CA 92226

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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FOURTH APPELLATE DISTRICT, DIVISION TWO

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states cited by appellant.

In sum, the three strikes law in California is clearly disproportionately harsher to the applicable law in any other jurisdiction. To reiterate, as stated by our state's Supreme Court in Lynch, "if the challenged penalty is found to exceed the punishments decreed for the offense in a significant number of those jurisdictions, the disparity is a further measure of its excessiveness." (In re Lynch, supra, 8 Cal.3d at p. 427 (emphasis added).) Here, the California penalty exceeds the penalty in every other jurisdiction. That fact compels the conclusion that, as applied to appellant, the penalty is unconstitutionally disproportionate to the offense, and constitutes cruel and unusual punishment under the United States and California Constitutions.

Clearly, under any rational interpretation of the Eighth Amendment, appellant's sentence is disproportionate to his culpability, to the nature of his offense, and to punishment for the same offense in other jurisdictions, the three criteria articulated in Lynch. Appellant urges this court to strike his sentence and remand the case to the trial court for a new sentencing hearing.

III

THE TRIAL COURT ERRED WHEN APPLYING THE "THREE STRIKES" LAW TO APPELLANT BECAUSE THAT LAW, BY ITS EXPRESS TERMS, DOES NOT APPLY TO PRIOR STRIKES WHICH OCCURRED BEFORE THE ENACTMENT OF THE THREE STRIKES LAW[5], AND VIOLATES THE PROHIBITION AGAINST EX-POST FACTO LAW (U.S. CONST. ART. I, SECT. 10 (CL. 1)) WITHIN THE MEANING OF WEAVER V. GRAHAM 450 U.S. 24 AND MILLER V. FLORIDA 492 U.S. 423, 96 L. Ed. 2d. 2446)

[5] Appellant is aware that on June 30, 1995, the Court of Appeal issued its

The trial court applied the "three strikes" law when computing appellant's sentence of 25 years to life.[6] (See Penal Code §667, subd. (e)(2)(A)(ii).) Appellant's case ostensibly fell under the three strikes law because he had suffered four prior serious felony convictions. (See sections 667, subd. (d)(1) and 1192.7, subd. (c)(19).)

Section 667, subdivision (d) governs whether a prior conviction is a strike for the purposes of the three strikes law.[7] That subdivision provides, in relevant part:

> "Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:
>
> (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony

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decision in People v. Sipe (1995) 36 Cal.App.4th 468, rejecting this argument, as well as other challenges raised to the sentencing scheme known as the three strikes law. (See also People v. Green (1995) 36 Cal.App.4th 280.) Nevertheless, appellant raises these arguments because, respectfully, he believes Sipe and Green were incorrectly decided, and also because it is necessary to preserve the issues for further appellate review in light of the unsettled state of the law.

[6] In the interests of brevity appellant will use the term "three strikes law" when referring to Assembly Bill Number 971 which changed the way sentences are computed for felons with one or two prior convictions for violent or serious felonies. The three strikes law became effective on March 7, 1994. (See Stats. 1994, ch. 12, §2.) It is codified in section 667. With the enactment of Proposition 184 in the November, 1994 election, provisions identical to the three strikes law now are found in a new statutory section, namely section 1170.12. (Compare section 667, subd. (c) to (g) with section 1170.12, subd. (a) to (e).)

[7] Appellant will use the term "prior strikes" when referring to those prior convictions which trigger the application of the three strikes law.

> conviction for purposes of section (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor. . . ." (Emphasis added.)

Appellant submits that under the plain meaning of language from section 667, subdivision (d), emphasized above, a prior conviction does not qualify as a strike for purposes of invoking the three strikes law unless, on the date the prior conviction is entered, the judge or the jury makes a determination that the conviction will qualify as a strike. The three strikes law thus cannot apply when any purported strike predates the enactment of the three strikes law. Therefore the three strikes law does not apply to appellant. Appellant's three prior strikes predated March 7, 1994, and no determination was made in 1985 or 1988 that the convictions were "a prior felony conviction for purposes of subdivision (b) to (i)." (Section 667, subd. (d)(1).)

It is axiomatic that a court's primary task when construing a statute is to determine the lawmakers' intent. (People v. Jones (1993) 5 Cal.4th 1142, 1146.) To determine that intent, courts turn first to the statute's words themselves. (Ibid.) Significance should be attributed to every phrase of a statute, and a construction making some words surplusage is to be avoided. (People v. Woodhead (1987) 43 Cal.3d 1002, 1010.) If the language is clear and unambiguous there is no need for construction of a statute. (People v. Jones, supra, 5 Cal.4th at p. 1146.) "Clear statutory language no more needs to be interpreted than pure water needs to be strained." (Holder v. Superior Court (1969) 269 Cal.App.2d 314, 317.) Courts decline to follow the plain meaning of a statute "only when it would inevitably have frustrated the manifest purpose of the legislation as a whole or led to absurd

results." (People v. Bellici (1979) 24 Cal.3d 879, 884.)

Appellant submits that the express language of the relevant portion of subdivision (d) is plain.[1] That language provides: "The determination of whether a prior conviction is a prior conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction. . . ." When appellant was convicted of two residential burglaries in 1985 and two residential burglaries in 1988, subdivisions (b) to (i) of section 667 had not been enacted. It was impossible at those times for the court or the jury to make a determination that the conviction would be a prior conviction for purposes of subdivisions of section (b) to (i) of section 667, as the three strikes law was enacted years in the future.

It might be argued that the above quoted language from subdivision (d), means that the court sentencing the defendant for the post-March 7, 1994, offense shall determine whether a prior is a strike by analyzing the state of affairs on the date of the prior conviction. That, however, is not what subdivision (d) says. Subdivision (d) says that the "determination" of whether the prior qualifies "shall be made upon the date of the prior conviction." It does not state that the determination shall be made during the proceedings in a later case by looking back in time to the state of affairs on the date of the prior conviction.

A question may arise as to why the Legislature wanted a finding as to the qualifying nature of the conviction at the time the conviction occurred. There are three obvious purposes for such a rule.

The first purpose would be to obviate the extensive litigation which has sprung from other statutes that, while dealing with prior convictions,

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[1] The term "subdivision (d)" refers to subdivision (d) of section 667.

did not contain a mandatory requirement that the qualifying nature of the prior be determined at the date of conviction.[9] Not only has this litigation been extensive, it even has led to contrary opinions by the Supreme Court in two cases decided within 16 months of each other. (See People v. Guerrero (1988) 44 Cal.3d 343, overruling People v. Alfaro (1986) 42 Cal.3d 627.) Subdivision (d) wisely obviates a great deal of similar litigation. Indeed, subdivision (d), as construed by appellant, avoids the precise problem inherent in the Guerrero/Alfaro situation, i.e., how to determine whether a prior conviction entered before the enactment of a priors statute comes within the provisions of that later-enacted statute.

A second purpose would be to obviate challenges to convictions that occurred prior to March 7, 1994, on the ground that the defendant would have used different tactics and may well have obtained different results if he knew the case might result in a strike. To illustrate, take a multi-count information filed against a first time offender in 1985 charging some offenses which are violent felonies under section 667.5, subdivision (c) and some which are not. In plea negotiations there was no strong incentive to plead guilty to a nonviolent felony rather than a violent one. This is because no one knew that nine years in the future a conviction for a violent

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[9] Because the Court is aware from its own case load of the large number of cases raising issues about whether priors qualify for enhancement, appellant will not include the serpentine string cite which supports his statement. He will, however, favor the Court with a chronological list of some Supreme Court cases which discuss retrospective determinations of the status of a prior conviction. (People v. Jackson (1985) 37 Cal.3d 826; People v. Thomas (1986) 41 Cal.3d 837; People v. Esquarte (1986) 42 Cal.3d 456; People v. Piper (1986) 42 Cal.3d 471; People v. Alfaro, supra, 42 Cal.3d 627; People v. Calio (1986) 42 Cal.3d 639; People v. Guerrero, supra, 44 Cal.3d 343; People v. Myers (1993) 5 Cal.4th 1193.)

felony would be a strike. However, similarly situated first time offenders facing charges from crimes committed after March 7, 1994, can take the three strikes law into consideration when negotiating a plea.[10] There is no compelling nor rational reason for treating similarly situated first-time offenders differently simply because one offender negotiated a plea bargain aware of the harsh possible consequences of the plea and the other offender had no knowledge of these potentially harsh consequences. The language of subdivision (d) here in issue has the effect of giving equal treatment to all offenders.

A third purpose of the plain language of subdivision (d) is that it allows defendants to be deterred by the specter of enormously increased sentences for new offenses while allowing the state time to build new prisons to incarcerate three strike offenders and to prepare financially for the substantial increase in costs inherent in the longer three strike sentences.

It is significant to note that subdivision (d) is not the first time the Legislature has addressed a question related to the contemporaneous determination of the nature of a conviction for purposes of later use as a prior. Case law interpreting the pre-three strikes version of section 667 consistently held that the determination of whether a conviction qualified as a serious felony was not to be made at the time of conviction but instead was to be made at a later time when the conviction was actually alleged as a prior. (People v. Sanchez (1991) 230 Cal.App.3d 768, 772-773; People v. Boynjian (1991) 228 Cal.App.3d 771, 774-775; People v. Ybarra (1988)

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[10] There are some restrictions on plea bargaining when a defendant has suffered prior strikes (see section 667, subd. (g)). These restrictions do not apply to first time offenders facing charges for offenses which can result in a strike.

206 Cal.App.3d 546, 549-550.) In 1991 the Legislature effectively abrogated this case law by enacting section 969f. That section provides that when the defendant has committed a serious felony, the accusatory pleading "may" charge it as such. Section 969f has the effect of avoiding later litigation over the serious nature of a prior by allowing the prosecutor to charge a pending crime as a serious prior. Section 667, subdivision (d), takes the matter one step further by requiring (rather than simply allowing) a determination about an offense's nature at the time it is tried, thus obviating the need for any future litigation on the issue.

Thus this court need not fear that it will twist the Legislature's intent if it construes subdivision (d) literally. The literal language of subdivision (d) reflects a considered decision that a contemporaneous determination of a conviction's status is better than a retrospective one and is less likely to lead to later litigation. The Legislature meant precisely what it said in subdivision (d).

While it might be argued that while the plain language of subdivision (d) requires a determination of an offense's nature at the time of conviction, that plain language should not be followed because it inevitably frustrates the manifest purpose of the legislation. (See People v. Bellici, supra, 24 Cal.3d at p. 884.) The purpose of the three strikes law is to "ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Section 667, subd. (b).) However, applying subdivision (d) in accordance with its plain language does not "inevitably" (People v. Bellici, supra, 24 Cal.3d at p. 884) frustrate this purpose. The plain language of subdivision (d) delays application of the law to people like appellant. As long as the preconditions of subdivision (d) have been met, longer punishment is

insured.

It is worth noting the supreme court's observation that "courts must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature." (People v. Weidert (1985) 39 Cal.3d 836, 843; citation and internal quotation marks omitted.) The language in subdivision (d) not only is plain, it also is based on sound considerations of policy and fairness and does not inevitably frustrate the purpose of the three strikes law. Accordingly, that plain language must be followed.

To summarize, subdivision (d) expressly provides that the provisions of section 667, subdivisions (b) to (i), apply only where there has been a determination on the date of the prior conviction that the conviction qualifies for use in subdivisions (b) to (i). The record is devoid of any evidence showing that determinations were made in 1985 or 1988 to the effect that the convictions would be for purposes of subdivisions (b) to (i) of section 667. Accordingly, the trial court erred when it sentenced appellant under the provisions of the three strikes law, and the matter should be remanded for resentencing. The new sentencing should be pursuant to sections 1170 and 1170.1, and not under the three strikes law.

IV

THE LEGISLATION IS UNCONSTITUTIONALLY VAGUE AND FAILS TO GIVE ADEQUATE NOTICE OF THE SPECIFIC PUNISHMENT TO BE IMPOSED

It is a fundamental precept of due process of law that an accused must have prior notice of the acts constituting a criminal violation. A recidivist must be given specific notice of the manner in which committing

elevate the petty theft to a felony is barred from being used under the "Three Strikes" law, according to the argument. Thus, for example, if the defendant is convicted of petty theft, and has a prior conviction for burglary and another prior conviction for forcible rape, the defendant still faces a double-the-term sentence under § 667(e)(1) for the prior rape conviction, even if defense counsel is successful in attacking the use of the prior burglary both to elevate the theft offense to a felony and to thereafter use it to further enhance the sentence under § 667(e)(2).

➤ CDP Ch. 91, "Sentencing."

POINT OF VIEW

*Gerald F. Uelmen**

Three "Called" Strikes and You're Out

The first argument that should be made by any competent defense lawyer whose client is charged as either a second offender or a third offender under the "Three Strikes and You're Out" measure is that the measure cannot be applied retroactively to use California convictions as priors if they predated enactment of the Three Strikes measure. It is essential that this issue be preserved for appeal, and that defense lawyers understand the statutory grounds for this objection. The argument which supports us on this issue is a strong one, and we can anticipate that many judges will be persuaded. A ruling that the current Three Strikes measure operates only prospectively with respect to California priors could be the key to getting a more rational alternative on the ballot in November.

The argument is based on the clear and unambiguous language of Penal Code § 667(d)(1), which provides:

> "(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: —
>
> "(1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i) inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor."

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SEE Attached

The only way to read this requirement is that, where a prosecutor seeks to use a California conviction for an offense listed in Penal Code § 667.5(c) (violent felonies) or in § 1192.7 (c) (serious felonies) as a prior, there must have been a determination that it was a prior for purposes of the "Three Strikes" measure on the date the conviction occurred. Giving the language any other meaning requires us to rewrite the words used by the legislature. The first principle of statutory construction is that words must be given their plain, ordinary meaning [*see* People v. Morris (1988) 46 Cal.3d 1, 15]. As the California Supreme Court recently stated in *Delaney* v. *Superior Court* [(1990) 50 Cal.3d 785, 804]:

> "It is bedrock law that if the lawmaker gives us an express definition, we must take it as we find it . . ."

It is important that you place primary reliance on the plain meaning of this language. Do *not* argue that ambiguities should be construed in favor of the defendant. They never are, and the strongest argument we have is that these words are *not* ambiguous, so extraneous proof of legislative intent is not appropriate. All we are asking is that the court apply the words as they are written.

Nor is this a constitutional argument. Arguing that priors preceding enactment could not be used because it violates ex post facto is a *loser* - don't even make the argument [*see* People v. Jackson (1985) 37 Cal.3d 826]. Clearly, the legislature *can* authorize use of previous priors (and we will concede they *did* authorize use of previous priors from other states and for juvenile adjudications, in Penal Code § 667(d)(2), (3)). But they did *not* do so in subdivision (d)(1), and if they want to do so, they will have to amend § 667(d)(1) to express a contrary intent.

What we are arguing is not a strained interpretation. A requirement that a determination "shall be made" on the date of conviction is not a mere formality. Not all offenses listed in Penal Code §§ 667.5(c) or 1192.7(c) would be priors for purposes of the "Three Strikes" measure. Section 667(h), for example, limits the use of these statutes to the form in which they existed on June 30, 1993, eight months before "Three Strikes" became law. Since that date, "carjacking" was added to the list of serious felonies in Penal Code § 1192.7(c) (effective October 1, 1993). Many of the offenses described in § 1192.7 do not precisely coincide with statutory definitions, so it may not be clear to anyone whether a particular conviction will qualify as a "strike."

Thus, it makes good sense to require sentencing judges to inform first offenders whether their convictions can be used as "strikes" in the future. Such an interpretation would also serve the deterrent function of the "Three Strikes" law. If convicted felons are warned that their sentences can be doubled on their next felony, or transformed into a life sentence on their third felony, they are much less likely to pursue felonious conduct.

The counter argument we can anticipate will be based on the canon of statutory construction that says language of a statute should not be given literal meaning if doing so would result in absurd results which the legislature could not have intended [*see* Younger v. Superior Court (1978) 21 Cal.3d 102, 113]. We should have our answers running, because there is nothing absurd about the interpretation we are presenting.

The first absurdity which will be thrown in our face comes from the legislative sponsor of the "Three Strikes" measure, Assemblyman Bill Jones of Fresno. In a letter to the editor of the Los Angeles Times, written in response to an "op-ed" I authored urging that "Three Strikes" be limited to prospective application [*see "Three Strikes" and a Balk: Beneficial Statutory Clinker*, Los Angeles Times, April 25, 1994], Assemblyman Jones wrote:

> "AB 971 states, in part, that a prior conviction of a felony (for the purposes of 'three strikes') shall be defined as a conviction in another jurisdiction for an offense that includes all of the elements of (a serious or violent felony in California). Since it would be 'absurd and stupid' to believe that California could place a requirement on other states that their judges inform convicted felons of an earned 'strike' in another state, application of the law is clearly retroactive. Further, portions of the bill which deal with juvenile adjudications list four conditions to qualify a conviction as a prior felony, none of which require a judge to determine or inform. Clearly, application of the law is retroactive" [*see* 'Letters to the Times,' Los Angeles Times, May 7, 1994].

The response, of course, is that Jones presses our argument beyond the point we are making to make it appear absurd. We are not suggesting that prior convictions from other states cannot be used unless the judge informed the defendant his conviction was a "strike" in California. Section 667(d)(2) does not impose such a requirement. Nor are we arguing that juvenile court judges give such a warning. Section 667(d)(3) does not require it. All we are arguing is that a determination must be made on the date of conviction in the case of California convictions included in Penal Code §§ 667.5(c) and 1192.7(c), because § 667(d)(1) *does* require it.

It would not be irrational to require a determination on (d)(1) convictions without imposing that requirement under

(d)(2) and (d)(3). The (d)(1) priors will cover the overwhelming majority of cases. More than 90 percent of "Three Strikes" cases will involve (d)(1) priors. Thus, the deterrent impact of the determinations will have the greatest impact under (d)(1). Requiring a determination in out-of-state cases would exceed the legislative power of the California legislature, and even if it were possible, would be a useless gesture in the overwhelming majority of cases, serving as a deterrent only for those defendants who already contemplated a move to California.

With respect to (d)(3) juvenile adjudications, requiring a determination "upon the date of that prior conviction" would be nonsensical, since there is no "date of conviction" in juvenile proceedings. A juvenile adjudication is not a conviction. The rehabilitative objective of juvenile proceedings would also warrant a different approach than the determination mandated by (d)(1). Finally, it should be noted that the unconstitutionality of (d)(3) is widely conceded, with many prosecutors publicly announcing they will not implement it. The severability clause of Section 667(i) will render it a nullity.

The "absurdity" argument will find no support in any other provisions of the "Three Strikes" measure. All the purposes of the measure will be fully achieved by the prospective implementation required by (d)(1). The deterrent impact will be immediate, and does not require the use of prior convictions which preceded the enactment of the measure. Moreover, the "absurdity" argument should not be used to redraft a law simply because the redrafted measure is perceived by a judge to be an improvement over the version produced by the legislature, even if it is a product of legislative oversight. Justice Edward Panelli recently made this point quite tellingly:

> "In my view, the majority is not warranted in invoking the maxim of 'absurdity' to justify ignoring explicit statutory language, even if it does so to achieve what it perceives to be a superior result. Instead, the unambiguous statutory language chosen by the legislature should be given effect" [*see* People v. Broussard (1993) 5 Cal.4th 1067, 1080 (Panelli, J. dissenting)].

A more troublesome counterargument will arise from the ruling of the California Supreme Court in *People* v. *Jackson* [(1985) 37 Cal.3d 826], which rejected an argument that the sentence enhancement provisions of Proposition 8 could not be applied retroactively to previous prior convictions. Justice Broussard's majority opinion noted:

> "Section 667 plainly was intended to take account of antecedent crimes; it includes in the list incorporated from Section 1192.7 crimes which were repealed prior to the effective date of the initiative. (See fn. 7, *ante*.) The basic purpose of the section - the deterrence of recidivism - would be frustrated by a construction which did not take account of prior criminal conduct" [*see* 37 Cal.3d at 833].

Since the "Three Strikes" measure also uses the § 1192.7 list, and since the list still includes the "repealed crimes," prosecutors will argue that Justice Broussard's conclusion is equally applicable to the "Three Strikes" measure. They are wrong for three reasons.

First, the issue in *Jackson* was whether a legislative intent to apply the measure to previous convictions could be implied. Here, we have explicit language which clearly expresses a contrary intent.

Second, the deterrent purpose is *not* frustrated by declining to apply the measure to previous convictions, because, unlike Proposition 8, the "Three Strikes" measure mandates a determination to be made on the date of the prior conviction that will itself further the deterrent purpose.

Finally, the factual predicate of Justice Broussard's argument is open to serious question. Section 1192.7 does not identify *any* offenses by reference to statutory provisions. In *Jackson* itself, the court approved the application of Proposition 8 enhancements to residential burglaries, even though there was no such offense as "residential burglary," and the element of the residential target was supplied by extraneous proof. The two "repealed"' crimes which were referred to in *Jackson* were assault by a life prisoner on a non-inmate, apparently based on Penal Code § 4500 prior to an amendment in 1977 which eliminated a distinction between inmates and non-inmates, and assault with intent to commit robbery, deleted from the "assault with intent" provisions of Penal Code § 220 in 1978. Justice Broussard's reading of these crimes out of the list as "repealed" was inconsistent with his ruling to accommodate "residential burglary." Both assaults by prisoners and assaults with intent to rob are still crimes in California; it's just that the non-inmate status of the victim or the intent to rob will have to be established by extraneous evidence. The inclusion of these offenses thus adds nothing to the determination whether retroactivity was intended or not.

What the current "Three Strikes" law really creates is a regimen of three *called* strikes and you're out. If California strikes were not called as they occurred, they cannot be used. That is what the law says, and unless our courts are ready to rewrite statutes, that is the way it should be applied.

1

THE CALIFORNIA THREE STRIKES AS APPLIED TO DEFENDANTS SENTENCE OF 25 TO LIFE FOR PRE-"THREE STRIKES" PRIORS CONSTITUTES A VIOLATION OF THE PROHIBITION AGAINS ~~POST~~ EX-POST-FACTO LAWS UNDER THE U.S. CONSTITUTION ARTICLE I, SECTION 10, CLAUSE 1. WITHIN THE MEANING OF WEAVER v. GRAHAM 450 U.S. 24 (MILLER v. FLORIDA (87) 482 U.S. 423, 96 L.ED.2D. 2446.) AND IS CONRARY TO THE EXPRESS WORDING AND MEANING OF THE THREE STRIKES STATUTE! ~~PETITIONER~~ DEFENDANT WAS GIVEN TWO PRIOR STRIKES OUT OF A PREVIOUS CONVICTION(S) IN _____ (YEAR) IN CASE NO(S): _____. OUT OF _____ COUNTY(S). BEFORE THE ENACTMENT OF THE VOTER INITIATIVE "THREE STRIKES PERSUANT Penal Code § 667 (c) and (e); Penal Code § 1170.12 passed into LAW IN 1994.

The U.S. Supreme Court has stated its' view as to what constitutes Ex-Post facto LAW IN THE ABOVE CASES AND SEE 53 L.ED.2D.1146. AN EX-POST FACTO LAW is one if applied RETROACTIVELY would cause a "Significant LIBERTY Interest OR LOSS".

Defendant New case involves a NON-SERIOUS(OR) non violent felony which absent this 1994 Three STRIKES enactment Defendant may recieve Probation or a County Jail Term of Less than a year upon the FIRST Offense, ~~sentenced~~ (MINIMUM TERM), OR upon a 2nd offense may carry _____ months, 2 years, or maximum of ___ years

2

California Penal Code also provides other Recidivist statutes to provide for 1 year enhancements which do not violate the "Double the Base term" Law in California.

However THIS New Law is NOT simply an enhancement for a NON-violent felony of Twice the Maximum Term or even Three Times the Maximum Term.

This STATUTE involves a "Significant loss of LIBERTY" beyond the Term of a Recidivist STATUTE when a Defendant is Sentenced to a Indeterminate Term of 25 years to LIFE and where his FIRST Parole Board Hearing will be in a Minimum of 20 years. When one Sentenced to Murder may get a Sentence of Life (Penal Code §189-190) and be eligible for parole in 7 years before the Board of Prison Terms.

WITH THE STATE of Parole Board Hearings in California, almost nobody in the state is Approved for parole during their FIRST or Second Parole Board Review, and then they still face a "VETO" by the Governor of California.

THIS IS AN EX-POST-FACTO LAW being used WITHOUT "NOTICE" RETROACTIVELY on priors before the enactment of Three STRIKES in 1994, because it involves a "Significant Loss of LIBERTY" as applied to this non-violent offense of

3

This LAW was NOT VOTED on to be applied Retroactively.

DEFENDANT ALSO RELIES UPON "PENDANT" JURISDICTION IMPLICITY AND EXPRESSLY STATED WITHIN THE THREE STRIKES STATUTE. THAT ITS USE NOT ONLY VIOLATES THE PROHIBITION AGAINST EX-POST FACTO LAW UNDER THE U.S. CONSTITUTION, BUT ALSO DENIES DUE PROCESS AND EQUAL PROTECTION THROUGH THE 14th Amendment Guarantees.

The "THREE STRIKES" LAW Implicitly AND Expressly STATES (Pen.C. §667(c)&(e); §1170.12) That THE "Determination of whether a prior SHALL BE A PRIOR FOR THE PURPOSES OF A 'STRIKE' SHALL be made on the DATE of that prior Conviction": (Emphasis).

This "NOTICE" is expressly guaranteed that upon any Plea Bargain or conviction the defendant will be notified, and will be able to make "knowing & intelligent" judgements or Waivers, the same considerations as discussed in Boykin v Alabama 397 U.S. 238, 243-44(69); THompson v. Blackburg 776 F. 2d. 118, 121-122 (85), before pleading or going to Trial, and upon conviction.

Courts have Long held that a statute must be construed in it's most favorable to defendant common ordinary sense meaning.

It's Simple. During your plea or upon conviction you are notified that this Conviction is a "STRIKE" under the Three Strikes Law

4

enacted in 1994. That any 2nd STRIKE will cause your Sentence to Double at 80% and your 3ED Strike will ~~be~~ mandate a 25 years to life Sentence"

That complies WITH THE plain, ordinary common sense Express wording of the Three STRIKES Law which states that the "Determination of whether a prior conviction shall be a prior for the purposes of a 'STRIKE' shall be made on the date of that Prior Conviction.

This is NOT A RETROACTIVE STATEMENT and would not violate Ex Post Facto Law Prohibition if the Express Wording were followed. Defendant has a 14th Amendment "Pendant" Right under the U.S. Contitution to Due Process & Equal Protection, TO demand that the State be held to this Express wording and meaning through the 14th Amendment to the U.S. CONSTITUTION.

THE NOTIFICATION THAT A ~~PRIOR~~ CONVICTION SHALL BE USED AS A "STRIKE" "SHALL BE MADE ON THE DATE OF THAT PRIOR CONVICTION" SHOULD BE ADHERED TO.

TO EXACT A 25 to LIFE Punishment Additionally for a New - NON violent offense of _____ where he has already served _____ years on a prior offense used as a "STRIKES" which occured before 1994 amounts to a Violation of the Prohibition against Ex-Post Facto

5

laws under the U.S. Const. Art I, sect. 10, Cl. 1 and the 14th Amendment is violated as alleged herein.

Applying this Law retroactively contrary to the express wording of the Statute amounts to a "Pendant" claim of a violation under the 14th Amendment U.S.C.A.

DECLARATION OF SERVICE

I, undersigned say: I am over 18 years of age, employed in the County of Santa Barbara, California, in which county the with-in mentioned delivery occurred, and not a party to the subject cause. My business address is 140 East Figueroa Street, Santa Barbara, California. I served the **Appellant's Pro Per Supplemental Petition for Review** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Fourth Appellate District - Division Two
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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Santa Barbara, California, on January ___, 1998.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 13, 1998, at Santa Barbara, California.

JAMES L. CROWDER

A P P E N D I X F

APPENDIX F

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
MICHAEL WAYNE RIGGS,
Defendant and Appellant.

Riverside County Superior Court No. CR66167
The Honorable Dennis McConaghy, Judge

RESPONDENT'S BRIEF

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **MICHAEL WAYNE RIGGS,** Defendant and Appellant.	E019488

STATEMENT OF THE CASE

An amended information filed on May 8, 1996, in Riverside County Superior Court charged appellant with petty theft with a prior (Pen. Code, § 666; count 1) and possession of a hypodermic needle and syringe (Bus. and Prof. Code, § 4149; count 2). It was alleged that appellant had served four prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). It was further alleged that appellant had been convicted of four strike priors within the meaning of Penal Code sections 667, subdivisions (c) and (e), and 1170.12, subdivision (c). (CT 61-64.)

A jury found appellant guilty of both substantive offenses. (CT 196.) The court found the prior conviction allegations to be true. (CT 249A-250.)

On November 26, 1996, appellant was sentenced to state prison for a term of 25 years to life on count 1 under the Three Strikes Law and a concurrent term of 90 days to county jail on count 2. The prior prison term enhancements were stricken. (CT 328; RT 333.)

Appellant filed his notice of appeal on November 26, 1996. (CT 327.)

STATEMENT OF FACTS

On October 15, 1995, Ann Lopez was working as a clerk at Albertson's Supermarket in Banning. At approximately 4:30 p.m., she brought the items in the non-food aisle to the edge of the shelf. Around this time, she observed appellant put a brown bottle in his coat. Appellant was standing right in front of the vitamins. Appellant kept his hand inside his coat. (RT 123-127.) As Lopez followed appellant, she noticed a bottle of vitamins was missing from the shelf. (RT 134.)

Appellant looked around and then walked toward the front of the store. Lopez notified two fellow employees, Randy Evans and Carl Ortega. Appellant walked around the checkstands and out of the store. As appellant walked out the door, Lopez, from a distance of about 15 feet, asked appellant to give them back the bottle. Appellant walked faster. Lopez yelled at appellant to give them the bottle two or three times. (RT 127-131.) Ortega told appellant he'd let him go if appellant gave them the vitamins. (RT 188.) Appellant continued to walk faster and then to run. Initially, Lopez, Evans and Ortega ran after him. (RT 127-131, 186-189.)

Lopez fell and Evans returned to the store to notify the manager. Ortega continued the chase. Appellant dropped the bottle of vitamins. They were the same variety as the bottle Lopez saw appellant put in his coat. (RT 131-136, 193-194.) As he ran, appellant told Ortega he could out-run him. Ortega stayed right behind him. Appellant said he had a knife and turned around and made a sweeping motion toward Ortega. Appellant did not have a knife. Ortega

continued to pursue him. Jason Miller, the manager of Albertson's, arrived to assist. Miller asked appellant to come back to the store and appellant refused. After a struggle, they handcuffed appellant. They escorted appellant back to the store. Appellant asked if he could work for the merchandise. (RT 190-197, 227-231.) Lopez, Ortega and Jason Miller all identified appellant. (RT 123-127, 188, 225.)

Appellant was searched by the police and a syringe was found in his sock. (RT 234-240.)

Defense

Appellant did not present a defense.

APPELLANT'S CONTENTIONS

1. The prosecutor committed prejudicial error in his argument to the jury.

2. Appellant's life sentence constitutes cruel and unusual punishment under both the California and federal institutions.

3. The trial court erred in its determination of presentence custody conduct credits.

RESPONDENT'S ARGUMENT

1. Appellant waived the issue of prosecutorial misconduct as to the majority of the prosecutor's closing argument; there was no misconduct; any misconduct was not prejudicial.

2. Appellant's sentence is not cruel and/or unusual punishment.

3. Appellant is entitled to additional conduct credits.

ARGUMENT

I.

APPELLANT WAIVED THE ISSUE OF PROSECUTORIAL MISCONDUCT AS TO THE MAJORITY OF THE PROSECUTOR'S CLOSING ARGUMENT; THERE WAS NO MISCONDUCT; ANY MISCONDUCT WAS NOT PREJUDICIAL

Appellant claims the prosecutor engaged in misconduct in closing argument when he referred to appellant's attempts to "push the envelope" and argued appellant was "pushing it to the limit" in the hope "people out there won't think at this time [his crime] is important and they won't vote guilty." (AOB 6-11.) Appellant waived the issue as to the majority of the argument. He did not object until the close of the People's argument. (RT 278.) At this point, the trial court agreed a portion of the closing argument was objectionable and admonished the jury. Respondent respectfully disagrees with the trial court and submits the argument of the prosecutor was not inappropriate. In any event, the admonition given by the trial court cured any potential prejudice. Regardless, any misconduct was not prejudicial and was harmless beyond a reasonable doubt.

A. The Prosecutor's Alleged Misconduct in Closing Argument

Contrary to appellant's contention, the prosecutor did not comment on appellant's exercise of his right to trial by jury. The prosecutor began his argument focusing on appellant's will to violate the law versus the Albertson's employees' will to do their jobs. (RT 265.) The prosecutor, in an effort to dissuade the jury from thinking just because appellant was fighting this petty theft charge he was

innocen' or because the prosecutor was pursuing the case appellant was guilty, pointed out they were not to speculate on why they were there on such a small case. He emphasized these were not things the jury should speculate on. (RT 266-267.) The prosecutor also told the jury they should not be prejudiced against appellant because he was charged or the case was brought to trial. (RT 267-268.) The majority of the argument focused on the testimony and the elements of the crime. (RT 268-277.) Toward the end of his argument, the prosecutor pointed out that appellant finally realized "their [the Albertson's employees') desire to be good employees and follow the law is stronger than his desire to disobey the law." (RT 277.)

He concluded:

> "We're in similar situation as jurors. You are sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills like the employees could have blown it off. It is kind of a test. He is pushing it to the limit. Maybe if I take it this far, maybe people out there won't think at this time is important and they won't vote guilty.
>
> "But it is important he is testing will the law be enforced? Will my lawlessness be tolerated by society. And the answer to that question must be no, and the answer to the question of guilt in this case must be yes. Thank you, very much." (RT 277-278.)

Appellant objected to these closing remarks. (RT 278-279.) The trial court found the prosecutor's argument from the point of "It is kind of a test," onward was inappropriate argument. (RT 280-281.) The court admonished the jury:

> "All right, ladies and gentlemen, before we have the defense counsel's argument I just want to make sure that nobody is led astray. There was a reference, actually the last paragraph of the argument was we're in similar situation as jurors. You're sitting as judges. Is your will to follow the law

> stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills, like employees could have blown if off.
>
> "If any of the jurors interpreted the following, anything after that, as meaning defendant should not or does not have a right to go to trial, period, that reference should not have been, I believe, it wasn't intended to mean that the defendant does not have a right to go to trial. But you are not to interpret that he did not have a right to go to trial, or the fact that he went to trial is any evidence of his guilt. As I say I don't think it was intended that way, but just if reading it I just want to make sure that you didn't take it that way." (RT 281-282.)

B. <u>Appellant Waived the Issue of Misconduct With the Exception of the Last Paragraph of the People's Argument</u>

Appellant did not object until the close of the prosecutor's argument. This objection preserved only the issue of whether the concluding remarks of the prosecutor's argument constitute misconduct. The failure to object and request an admonition waived the issue of misconduct as to any prior statements of the prosecutor. Specifically, appellant's claim as to the prosecutor's initial comments on why appellant might be fighting such a minor charge (RT 266-267; AOB 6) has been waived.

To preserve a claim of prosecutorial misconduct for appeal, a defendant must *both*: 1) object to the alleged misconduct *and* 2) request an admonition where such an admonition would clearly have cured any harm. (*People* v. *Montiel* (1993) 5 Cal.4th 877, 912, 914, cert. den. (1994) 114 S.Ct. 2782; see also *People* v. *Heldenburg* (1990) 219 Cal.App.3d 468, 472-475 [claim waived where defense timely objected, requested and obtained trial court's agreement to admonish jury, but sat quietly when court neglected to give admonition].) The reason that *both* requirements must be met is that the trial court should be given

an opportunity to cure any harm. (*People* v. *Bonin* (1988) 46 Cal.3d 659, 689.)

Here, appellant objected only to the last portion of the prosecutor's argument. The failure to object to the prosecutor's initial comments that the jury should not speculate as to why they were there on such a small case has waived the issue. (*People* v. *Jones* (1997) 15 Cal.4th 119, 179-180 [Objection to comparing the defendant to one murderer did not preserve issue of misconduct for analogies to other murderers].) Furthermore, as discussed below, the statements were not misconduct, and, even if they were misconduct, the admonition given cured any potential prejudice. In addition, any misconduct was harmless beyond a reasonable doubt.

C. **The People's Closing Argument Was Proper and the Admonition Cured Any Potential Prejudice.**

Appellant ignores the substance of the prosecutor's closing argument in concluding the prosecutor commented on appellant's exercise of his right to trial by jury. The prosecutor was arguing that appellant pushed the employees of Albertson's in the hope they would let him go and was now hoping the jury would let him off because the crime was relatively minor. The prosecutor specifically told the jury appellant's guilt was not to be inferred from the fact he was charged or was on trial. The crux of the argument did not focus on the exercise of a right but on appellant's actions throughout the entire course of events. This was the theme of the People's case and proper argument in light of appellant's lack of defense and the overwhelming case against him.

It was clear from the trial appellant was throwing himself at the mercy of the jury. The prosecutor was simply emphasizing that the jury must follow the law regardless of the value of the merchandise stolen. The prosecutor was attempting to prevent jury nullification. He was obviously fearful the jury might conclude the offense was so minor appellant did not deserve a felony conviction.

Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or jury. (*People* v. *Haskett* (1982) 30 Cal.3d 841, 866; *People* v. *Strickland* (1974) 11 Cal.3d 946, 955.) While it is not necessary to show bad faith, it is necessary to show that appellant's right to a fair trial was prejudiced by the claimed misconduct. (*People* v. *Sassounian* (1986) 182 Cal.App.3d 361, 390, *cert. den.* 481 U.S. 1034, 107 S.Ct. 1977.)

It has long been recognized that "[c]losing argument presents a legitimate opportunity to 'argue all reasonable inferences from evidence in the record.' [Citations.]" (*People* v. *Bolton* (1979) 23 Cal.3d 208, 212.) This opportunity includes the right of the prosecutor "to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. [Citation.] The prosecutor may not, however, argue facts or inferences not based on the evidence presented. [Citation.]" (*People* v. *Lewis* (1990) 50 Cal.3d 262, 283.)

A prosecuting attorney may properly comment on the evidence presented at trial and offer the jury his or her views of the inferences which should be drawn from the evidence. (*People* v. *Wein* (1958) 50 Cal.2d 383, 396 (overruled on another ground, *People* v. *Daniels* (1969) 71 Cal.2d 1119, 1141, fn. 14); *People* v. *Silva* (1953) 41 Cal.2d 778, 783.)

It is only when the prosecutor relies on deceptive or reprehensible methods to persuade the jury does misconduct occur. In the instant case the complained of remarks made by the deputy plainly referred only to evidence properly before the jury or to inferences reasonably arguable therefrom. (See *People* v. *Ratliff* (1987) 189 Cal.App.3d 696, 702; *People* v. *Prysock* (1982) 127 Cal.App.3d 972, 997.)

Where it is unlikely the comments of the prosecutor were misconstrued in an objectionable fashion it is not misconduct. (*People* v. *Berryman* (1993) 6 Cal.4th 1048, 1072.) Here, it is unlikely the jury understood the prosecutor's comments to mean appellant was guilty because he exercised his right to a jury trial. In fact, the prosecutor specifically told the jury this was not relevant and the jury should not speculate as to why the case was brought to trial. (RT 266-268.)

The inference appellant was simply hoping to get off because the crime was relatively minor was reasonable in light of the lack of a defense and the fact appellant was identified by three employees and detained at the scene of the crime. The prosecutor could properly comment that the fact appellant was fighting the charge did not mean anything one way or the other. The prosecutor told the jury not to speculate as why they were there. At no time, did he indicate this meant appellant was guilty or guilt could be inferred from the fact the case was brought to trial. In fact, he told the jury it did not mean that. (RT 267-268.) At no time did the prosecutor indicate the appellant was not presumed innocent or the burden of proof was different than that instructed by the court. The argument of counsel was not misconduct.

To the extent the jury may have inferred from the prosecutor's comments a reference to appellant's exercise of his right to trial by jury, this was cured by the admonition. This is especially so in light of the

prosecutor's comments along the same lines and the instruction that guilt was not to be inferred from the fact appellant was charged and brought to trial. (RT 254, 267-268; CT 209-210.)

D. Any Error Was Harmless and Not Prejudicial In Light of the Overwhelming Evidence of Guilt and the Lack of a Defense

As noted, in order for misconduct to warrant reversal there must be prejudice to the defendant. Here, there was no prejudice and any error was harmless. The effect of instances of misconduct is ordinarily reviewed under the *Watson* standard, that is whether it is reasonably probable that a result more favorable to defendant would have occurred in the absence of the error. (*People* v. *Green* (1980) 27 Cal.3d 1, 27; *People* v. *Watson* (1956) 46 Cal.2d 818, 836.) The *Chapman*[1] test is not applicable to review of such issues.

The United States Supreme Court has stated:

> "This Court has recognized that prosecutorial misconduct may 'so infect the trial with unfairness as to make the resulting conviction a denial of due process.' *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (Citations.) To constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" (*United States* v. *Bagley* (1985) 473 U.S. 667, 676, 87 L.Ed.2d 481, 105 S.Ct. 3375 (Citations); (quoting *United States* v. *Agurs* (1976) 427 U.S. 97, 108.)

Here, fundamental fairness was not violated. If the comments in some way constituted comment on appellant's exercise of his right to a jury trial, his trial was fair as the prosecutor's statements were ambiguous and, in light of the overwhelming evidence of guilt, the

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1. *Chapman* v. *California* (1967) 386 U.S. 18; 17 L.Ed.2d 705; 87 S.Ct. 824.

comments could not have had an impact on the jury's ultimate conclusion. Appellant was observed taking the vitamins off the shelf and putting them in his coat pocket. He was identified by three eyewitnesses. He was observed trying to get rid of the vitamins. Appellant was apprehended at the scene. He admitted his guilt by asking to work for the merchandise he had stolen. (RT 123-127, 134, 188-197, 225, 227-231.) The ambiguous comments of the prosecutor did not render his trial unfair.

Even if the *Chapman* test is applied any misconduct was harmless beyond a reasonable doubt as there were three eyewitness, appellant was apprehended at the scene, he presented no defense, the court admonished the jury and instructed them that the fact a person is on trial is not evidence of guilt. Any misconduct did not result in an unfair trial and it was harmless beyond a reasonable doubt.

II.

APPELLANT'S SENTENCE IS NOT CRUEL AND/OR UNUSUAL PUNISHMENT

Appellant contends his sentence constitutes cruel and unusual punishment under the United States and California Constitutions. (AOB 12-21.) Appellant is wrong. His punishment is proportional to his status as a habitual offender who has committed a felony and has one or more serious or violent felony convictions.

Preliminarily it should be noted that claims of cruel and unusual punishment under the Three Strikes Law have been rejected in other cases. (See *People* v. *Ayon* (1996) 46 Cal.App.4th 385, 401 [240 years to life not cruel and unusual punishment]; *People* v. *Ingram* (1995) 40 Cal.App.4th 1397, 1417 [sentence of 61 years to life not cruel and unusual punishment]; *People* v. *Cooper* (1996) 43 Cal.App.4th 815 [25 years to life for ex-con in possession of a handgun not cruel and unusual punishment].)

Since this issue is a fact-based inquiry, and appellant did not raise the issue at trial or sentencing, respondent questions whether the issue has been preserved for appeal. (*People* v. *Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8, citing *People* v. *Dillon* (1983) 34 Cal.3d 441, 477-482 and *People* v. *Mickle* (1991) 54 Cal.3d 140, 186; but see *People* v. *Weddle* (1991) 1 Cal.App.4th 1190, 1197 [an appellate court, like a trial court, is authorized to consider proportionality of a sentence based on the facts], citing *People* v. *Leigh* (1985) 168 Cal.App.3d 217, 223 and 3 Witkin & Epstein, Cal. Criminal Law (2nd ed. 1989) Punishment for Crime, § 1336, pp. 1559-1560.) Moreover, since no such objection was raised below there is little information in the record to evaluate appellant's claim. However, this lack of information simply

functions as a detriment to appellant as he has the burden of proving his allegation of cruel or unusual punishment. (*People* v. *Weddle*, *supra*, 1 Cal.App.4th at p. 1197; *In re DeBeque* (1989) 212 Cal.App.3d 241, 249.)

Penal Code section 667, subdivisions (b) through (i), provides for a doubling of the base term for the present felony if a defendant has one qualifying prior felony conviction, or an indeterminate term of 25 years to life for those who commit a felony and have two or more prior serious or violent felonies. Appellant committed a felony and had four qualifying prior felony convictions. (RT 317.) He was sentenced in accordance with the Three Strikes Law. (CT 328.)

The power to define crimes and prescribe punishment is a legislative function in which courts will only interfere if the statute prescribes a penalty so severe in relation to the crime as to violate the constitutional prohibition against cruel and unusual punishment. (*People* v. *Dillon*, *supra*, 34 Cal.3d at pp. 477-478; *In re Lynch* (1972) 8 Cal.3d 410, 423-424.)

Although appellant cites the court to both federal and state authority, appellant appears to principally rely on California authority to support his claim that his 25 year to life sentence for petty theft with a prior constitutes cruel and unusual punishment. Appellant bases the principal thrust of his arguments on *In re Lynch*, as later interpreted by *Dillon*. His approach to the issue does not appear to rely upon the federal prohibition against cruel and unusual punishment contained in the Eighth Amendment as applied to the states through the Fourteenth Amendment, but rather appears to rely exclusively upon the prohibition against cruel or unusual punishment contained in California Constitution article I, section 17.10.

However, as to the federal component of appellant's claim, it must be remembered that challenges to sentences under the Eighth Amendment are allowed for only a limited proportionality review of the sentence length.

> "[O]utside the context of capital punishment successful challenges to the proportionality of particular sentences [will be] exceedingly rare . . . Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." (*Solem* v. *Helms*, 463 U.S. 277, 289-290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), cites and internal quotes omitted.)

In *Harmelin* v. *Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), the United States Supreme Court upheld a life sentence without the possibility of parole for a defendant who had possessed 672 grams of cocaine. While *Harmelin* did not contain a majority opinion with respect to the proportionality of the sentence, two justices determined that the Eighth Amendment had no proportionality guarantee. (*Harmelin*, 501 U.S. at p. 965 (opn. of Scalia, J.).) Three other justices concluded that the Eighth Amendment forbad only the those sentences that were "grossly disproportionate" to the crime. (*Harmelin*, 501 U.S. at p. 1001 (opn. of Kennedy, J.).) Even those justices who recognized a guarantee of proportionality review stressed that, outside the context of capital punishment, successful challenges to particular sentences were exceedingly rare because of the "relative lack of objective standards concerning terms of imprisonment." (*Ibid.*) The fact that a sentence is mandatory does not suggest that it is cruel and unusual. (*Harmelin* v. *Michigan*, *supra*, 501 U.S. at pp. 994-995; see also *People* v. *Crooks* (June 10, 1997, C023565) __ Cal.App.4th __ [97 Daily Journal, D.A.R. 7328, 7331].) Here, in light of the focus on recidivism

and appellant's substantial record discussed below, the sentence is not disproportionate or cruel and unusual under federal law.

The question thus left is whether, under the circumstances of this case, the punishment imposed is cruel and unusual under California law. (See *People* v. *Dillon*, *supra*, 34 Cal.3d at p. 441; *In re Lynch*, *supra*, 8 Cal.3d at p. 410.) The answer is no.

Under the analysis of *Lynch* as refined by *Dillon*, three prongs are examined in determining whether a sentence is cruel or unusual punishment. Under the first prong, the court examines the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch*, *supra*, 8 Cal.3d at p. 425; *People* v. *Ayon*, *supra*, 46 Cal.App.4th at p. 398.) The Supreme Court in *Dillon*, refined the first prong of the analysis so that the court should not examine the crime in the abstract, but also the facts of the crime in question. Courts should consider the totality of the circumstances, including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of the defendant's acts. With respect to the offender, the court should ask whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind. Second, the court compares the challenged punishment with punishments prescribed for more serious crimes in the same jurisdiction. Third, the challenged punishment is compared with punishments for the same offense in other jurisdictions. (*People* v. *Dillon*, *supra*, 34 Cal.3d at p. 479.)

Ultimately, the test of whether a specific punishment is cruel or unusual is whether it is out of all proportion to the offense so as to shock the conscience and offend fundamental notions of human dignity.

(*In re Lynch*, *supra*, 8 Cal.3d at p. 424, fn. omitted.) The analysis developed in *In re Lynch* and *Dillon* merely provides guidelines for determining whether a given punishment is cruel or unusual and the importance of each prong depends on the facts of the specific case. (*People* v. *Ayon*, *supra*, 46 Cal.App.4th at pp. 398-399, citing *In re DeBeque*, *supra*, 212 Cal.App.3d at p. 249.) The defendant has the burden of establishing that his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (See *id.* at pp. 254-255.) Successful challenges to proportionality are an "exquisite rarity." (*People* v. *Weddle*, *supra*, 1 Cal.App.4th at p. 1196.) Because it is the Legislature which determines the appropriate penalty for criminal offenses, a defendant must overcome a considerable burden in convincing the court the sentence was disproportionate to his level of culpability. (*Id.*, at p. 1197, citing *People* v. *Bestelmeyer* (1985) 166 Cal.App.3d 520, 529.)

Recidivism poses a manifest danger to society and is a proper factor in determining the length of a prison sentence. (See *People* v. *Karsai* (1982) 131 Cal.App.3d 224, 242; disapproved on other grounds in *People* v. *Jones* (1988) 46 Cal.3d 585, 600, fn. 8.) California has long upheld imposition of greatly enhanced sentences for recidivists. (See *In re Rosencrantz* (1928) 205 Cal. 534, 536-539; *People* v. *Weaver* (1984) 161 Cal.App.3d 119, 125-126.)

> "The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for

> other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Rummel* v. *Estelle* (1980) 445 U.S. 263, 284-285 [63 L.Ed.2d 382, 100 S.Ct. 1133].)

Appellant was convicted of petty theft with a prior. (CT 328.) He attempts to characterize the sentence based solely on the present crimes as cruel an unusual because the crime was a theft which was not serious or violent. (AOB 13-16.) However, his view is short-sighted because his punishment is not based solely on his present crime. Appellant is being punished because he has committed felonies in the past, which were serious or violent, and has again committed a felony.

At the time of sentencing appellant was 45 years old. (CT 253.) This is in contrast to the defendant in *Dillon* who was 17 years of age.

Appellant has committed numerous crimes. He was committed to the California Youth Authority in 1969 for possession of dangerous drugs and burglary. His adult record begins in June of 1971 and includes the following: eight misdemeanor convictions, two felony convictions for possession of a controlled substance in 1981 (Health and Saf. Code, § 11350) resulting in a two-year suspended sentence and probation, a felony conviction for attempted burglary in 1983 (Pen. Code, §§ 664/459) resulting in an eight-month prison term, two felony convictions for forgery (Pen. Code, § 470), two felony convictions for receiving stolen property (Pen. Code, § 496), and a felony conviction for passing a check with intent to defraud (Pen. Code, § 476a) in 1984, resulting in two years in prison, a felony conviction for possession of a controlled substance in 1986, (Health and Saf. Code, § 11350) resulting

in a sixteen-month prison term, and four felony convictions for robbery (Pen. Code, § 211) in 1989, resulting in a twelve-year, eight-month prison term. (CT 255-256.) He has now committed yet another felony, an indication that time served in prison has not deterred him from committing more crimes. This too is in contrast to the defendant in *Dillon* who had no criminal history.

Appellant's punishment is not merely based on the present crime. It is punishment based on his recidivism which has long been recognized as proper. (See *In re Rosencrantz*, *supra*, 205 Cal. at pp. 536-539; *People* v. *Weaver*, *supra*, 161 Cal.App.3d at pp. 125-126.) Determinations whether a punishment is cruel or unusual may be based on the first prong alone. (*People* v. *Dillon*, *supra*, 34 Cal.3d at pp. 479, 482-488; *People* v. *Weddle*, *supra*, 1 Cal.App.4th at pp. 1198-1200; *People* v. *Young* (1992) 11 Cal.App.4th 1299, 1308-1311.) Appellant's criminal history justifies the imposition of the term imposed.

When examining the challenged punishment with punishments prescribed for more serious crimes in the same jurisdiction, it is appellant's burden of establishing that his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (*In re DeBeque*, *supra*, 212 Cal.App.3d at pp. 254-255.) Appellant has failed to carry his burden. Such a comparison fails because it is appellant's recidivism in combination with his current offense which places him under the Three Strikes Law. It would be illogical to compare recidivist behavior with other crimes which are not recidivist in nature.

A review of statutes from other jurisdictions demonstrates punishment for habitual offenders similar to that contained in the Three Strikes Law is common. A statutory scheme which results in life

imprisonment for a nonviolent criminal upon a third felony conviction does not violate the federal prohibition against cruel and unusual punishment. (See *Rummel* v. *Estelle*, *supra*, 445 U.S. at p. 263; cf. *Bordenkircher* v. *Hayes* (1978) 434 U.S. 357 [imposition of life imprisonment under recidivist statute for uttering a forged instrument in the amount of $88.30 upheld against vindictive prosecution claim].) Statutes in at least 40 states provide for enhanced sentences for habitual offenders.[2/] In Alabama, a criminal defendant with two prior felony convictions who is later convicted of a third felony must be imprisoned for from 10 years to life depending upon the class of the current felony. (Ala. Code, §§ 13A-5-6; 13A-5-9.) If the defendant has

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2. Recidivist statutes are currently in effect in at least Alabama (Ala. Code, § 13A-5-9), Arizona (Ariz. Rev. Stat. Ann., § 13-604), Arkansas (Ark. Code Ann., § 5-4-501), Colorado (Colo. Rev. Stat., § 16-13-101), Connecticut (Conn. Gen. Stat. Ann., § 53a-40), Delaware (Del. Code Ann., tit. 11, § 4214), Florida (Fla. Stat. Ann., § 775.084), Georgia (Ga. Code Ann., § 17-10-7), Hawaii (Hawaii Rev. Stat., § 706-606.5), Idaho (Idaho Code, § 192514), Illinois (Ill. Ann. Stat., ch. 720, § 33B-1), Indiana (Ind. Code, § 35-50-2-8.5), Kansas (Kan. Stat. Ann., § 21-4504), Kentucky (Ky. Rev. Stat. Ann., § 532.080), Louisiana (La. Rev. Stat. Ann., § 15:529.1), Maryland (Md. Ann. Code, art. 27,§ 643B), Michigan (Mich. Comp. Laws Ann., § 769.12), Mississippi (Miss. Code Ann., § 99-19-83), Missouri (Mo. Ann. Stat., § 558.016), Montana (Mont. Code Ann., § 46-18-501), Nebraska (Neb. Rev. Stat., § 29-2221), Nevada (Nev. Rev. Stat., § 207.010), New Hampshire (N.H. Stat. Ann., § 651:6), New Jersey (N.J. Stat. Ann., §§ 2C:44-3, 2C:43-7), New York (N.Y. Penal Law, § 70.08), North Carolina (N.C. Gen. Stat., §§ 14-7.1, 14-7.6), North Dakota (N.D. Cent. Code, § 12.1-32-09), Oklahoma (Okla. Stat., tit. 21, § 51), Oregon (Ore. Rev. Stat., § 161.725), Rhode Island (R.I. Gen. Laws, § 12-19-21), South Carolina (S.C. Code Ann., § 17-25-45), South Dakota (S.D. Codified Laws, § 22-7-8), Tennessee (Tenn. Code Ann., §§ 40-35-106, 40-35-107, 40-35-108), Texas (Tex. Penal Code Ann., § 12.42), Utah (Utah Code, § 76-8-1001), Vermont (Vt. Star. Ann., tit. 13, § 11), Virginia (Va. Code, § 19.2-297.1), Washington (Wash. Rev. Code Ann.,§ 9.92.090), West Virginia (W. Va. Code, § 61-11-18) and Wyoming (Wyo. Stat., § 6-10-201).

had three prior felony convictions, the mandatory sentence is increased to a minimum of 15 years to a maximum of life imprisonment without parole depending upon the class of the current felony. (Ala. Code, § 13A-5-9.) Delaware requires imposition of a life sentence on a defendant who is convicted of a named felony including burglary in the first and second degree, manslaughter, assault in the first degree and certain drug manufacturing or trafficking offenses if the defendant has two prior convictions of the named felonies. (Del. Code Ann., tit. 11, § 4214.) Upon conviction of a third felony, Idaho provides a defendant shall be sentenced to from five years to life (Idaho Code, § 19-2514), while in Mississippi a third felony conviction, if one of the convictions involves a crime of violence, results in life imprisonment without parole (Miss. Code Ann. § 99-19-83). Under Illinois law a defendant three times convicted of a Class X felony, for which the sentence is normally from six to thirty years, shall be sentenced to life imprisonment. (Ill. Ann. Stat., ch. 720, § 33B-1 and ch. 730, § 5-8-1.) In Indiana a defendant with two prior specified felony convictions may be sentenced to life imprisonment without parole upon conviction of a third specified felony. (Ind. Code, § 35-50-2-8.5.) The specified felonies include murder, battery with a deadly weapon, robbery or burglary with a deadly weapon or resulting in serious bodily injury, and dealing in schedule I, II, or III controlled substances with an aggregate weight of three grams or more. (Ind. Code, § 35-50-2-2.) Nebraska provides that a defendant who has twice been convicted of any crime resulting in a prison sentence of not less than one year and later is convicted of any felony shall be imprisoned for from 10 to 60 years (Neb. Rev. Stat., § 29-2221), while a defendant in Rhode Island who has previously been convicted of any two felonies shall serve 25 years in addition to the

sentence normally imposed for any third conviction punishable by imprisonment of more than one year (R.I. Gen. Laws, § 12-19-21).

In South Carolina a defendant with three convictions for specified violent crimes, including those for first and second degree burglary, must be sentenced to life imprisonment without parole (S.C. Code Ann. §§ 17-25-45, 16-1-60), and in Vermont a person with any three felony convictions may be sentenced to life imprisonment upon conviction of a fourth felony (Vt. Stat. Ann., tit. 13, § 11). Criminal defendants in both Washington and West Virginia convicted of any felony who have previously been convicted of two felonies shall be imprisoned for life. (Wash. Rev. Code Ann., § 9.92,090; W. Va. Code, § 61-11-18.) Finally, in Wyoming if a defendant with three or more previous felony convictions is convicted of a violent felony, the defendant is imprisoned for life. (Wyo. Stat., § 6-10-201.)

While comparative analysis among states is difficult, it is clear many of the statutory schemes presented provide for life imprisonment and at least four states (Alabama, Mississippi, Indiana and South Carolina) provide for life imprisonment without possibility of parole. Both Washington and West Virginia upon conviction of a third felony require life imprisonment without regard to the nature of the felonies. California's scheme, while possibly more severe in some respects than the schemes of other jurisdictions, appears to be less severe in other respects. Overall, California's Three Strikes Law, rather than being out of the ordinary, appears to be part of a nationwide pattern of recidivist statutes calling for substantially increased sentences for habitual offenders.

Ultimately, the test of whether a specific punishment is cruel or unusual is whether it is "'out of all proportion to the offense' so as

to shock the conscience and offend fundamental notions of human dignity." (*In re DeBeque*, *supra*, 212 Cal.App.3d at p. 249, quoting *Robinson* v. *California* (1962) 370 U.S. 660, 676 [8 L.Ed.2d 758, 82 S.Ct. 1417], and citing *In re Lynch*, *supra*, 8 Cal.3d at p. 424.) A review of the nationwide habitual offender statutes provides compelling evidence that imposition of a severe sentence including life under the circumstances presented here would not shock the conscience or be out of proportion to the offense committed.

Moreover, the initiative process resulting in the passage of Proposition 184 provides a unique opportunity to consider directly the opinion of a large portion of the California populace with respect to the punishments provided under the Three Strikes provisions. The legislative analysis for Proposition 184 included a table informing the voters that a defendant with two prior serious or violent convictions whose current crime is neither serious nor violent would receive a life sentence of at least 25 years, the same sentence that would be imposed on a defendant whose current offense is a violent or serious felony. (Ballot Pamp., Analysis of Prop. 184 by Legislative Analyst, Gen. Elec. (Nov. 8, 1994) p. 34.) The argument against the proposition stressed that the measure applied even though the third strike was neither a serious nor a violent felony and claimed that three out of four people convicted under the proposition would be imprisoned for nonviolent crimes. (Ballot Pamp., rebuttal to the argument in favor of Prop. 184 as presented to the voters, Gen. Elec. (Nov. 8, 1994) p. 36; Ballot Pamp., *supra*, argument against Prop. 184, p. 37.) Nonetheless, the voters approved the proposition by a margin of 72 percent to 28 percent. (Statement of Vote, Gen. Elec. (Nov. 8, 1994) p. ix.)

It may be inferred from the results of the election that well over two-thirds of California voters do not consider it cruel or unusual punishment for a recidivist offender convicted of a nonviolent, non-serious felony with prior convictions for violent or serious felonies, to receive a sentence of 25 years to life. While it is conceivable that a sentence violative of the cruel or unusual punishment prohibition might be approved by the electorate, such is highly unlikely and unquestionably did not occur here. Neither the statutory scheme nor the sentence that would be imposed upon appellant under that scheme is such that it shocks the conscience or violates notions of human dignity. Rather, the enactment of the statute and its appropriate application to appellant results from a need to deter offenders who repeatedly commit crimes serious enough to be classified as felonies and to segregate those offenders from the rest of society for an extended period of time.

The sentence to be imposed upon appellant pursuant to the Three Strikes Law does not constitute cruel and/or unusual punishment.

III.

APPELLANT IS ENTITLED TO ADDITIONAL CONDUCT CREDITS

Appellant contends the trial court erroneously applied the 15 percent credit limitation of Penal Code section 2933.1, subdivision (c). He claims that instead of being credited with 61 conduct days, the court should have given 204 days of conduct credit. Respondent concedes petty theft with a prior is not a violent felony within the meaning of Penal Code section 667.5. Respondent further concedes appellant is entitled to credits pursuant to Penal Code sections 2900.5 and 4019, for his presentence custody. (*People* v. *Hill* (1995) 37 Cal.App.4th 220.) Respondent concedes appellant is entitled to a total of 204 days of conduct credit.

CONCLUSION

Accordingly, respondent respectfully asks that the judgment be affirmed.

Dated: July 16, 1997.

Respectfully submitted,

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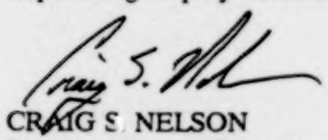

CRAIG S. NELSON
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

Case Name: People v. Michael Wayne Riggs No.: E019488

I declare:

I am employed in the County of San Diego, California. I am 18 years of age or over and not a party to the within entitled cause; my business address is 110 West A Street, Suite 1100 Diego, California 92101.

On July 17, 1997, I served the attached

RESPONDENT'S BRIEF

I served a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as follows:

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APPELLATE DEFENDERS, INC.
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GROVER C. TRASK, II
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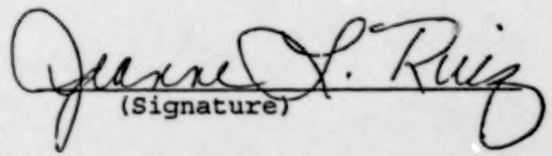
I declare under penalty of perjury the foregoing is true and correct, and this declaration was executed at San Diego, California, on July 17, 1997.

JEANNE L. RUIZ
(Typed Name)



(Signature)

A P P E N D I X   G

APPENDIX G

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL WAYNE RIGGS, Defendant and Appellant.	Court of Appeal No. E019488 Super. Ct. No. CR66167

APPEAL FROM THE SUPERIOR COURT
OF RIVERSIDE COUNTY

The Honorable Dennis McConaghy, Judge Presiding

APPELLANT'S OPENING BRIEF

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Attorney for appellant,
By appointment of the
Court of Appeal under
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FOURTH APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	Court of Appeal No. E019488
v.	)	Super. Ct. No. CR66167
MICHAEL WAYNE RIGGS, Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a trial and is authorized by the provisions of Penal Code section 1237, subdivision (a).

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STATEMENT OF THE CASE

In a two-count amended information appellant was charged with petty theft with a prior conviction of robbery [Ct. 1, Pen. Code, § 666] and possession of a hypodermic syringe [Ct. 2, Bus. & Prof. Code, § 4149].
The amended information alleged that appellant had suffered three prior convictions within the meaning of Penal Code section 667, subdivisions (c) and (e) and Penal Code section 1170.12, subdivision (c) [prior strikes]. Four prior convictions were alleged within the meaning of Penal Code section 667.5, subdivision (b) [prior prison terms]. (CT 61-64.)[1]

Trial was by jury, with the trial of the prior conviction allegations being bifurcated from the trial of the substantive offenses. (CT 196, RT 80.) The jury returned its verdicts finding appellant guilty of the substantive offenses. (CT 205-206.) Trial of the prior conviction allegations was by the court and the court found the allegations to be true. (CT 2449A-250.)

At sentencing, an indeterminate sentence of 25 years to life was imposed for Count 1. A 90 day county jail sentence was imposed for Count 2 to be served concurrently. The three prior prison term enhancements were stricken. The trial court credited appellant with 411 days for actual

[1]As used herein "CT" shall denote the Clerk's Transcript, and "RT," shall denote the Reporter's Transcript on appeal.

presentence custody and with 61 days of presentence custody conduct credits. (CT 325.)

Appellant thereafter filed a timely notice of appeal. (CT 327.)

STATEMENT OF FACTS

On October 13, 1995, at approximately 5:10 p.m., at an Albertsons Store located in Banning an employee, Anne Lopez, was working in one of the aisles. She noticed appellant standing in the vitamin section. She saw appellant take a bottle from an "Energy Pill" display and place it in his left front jacket pocket. The employee suspected that appellant was going to steal the bottle of vitamins, so she continued to watch him. She followed him as he walked away from the aisle towards the check stands, past the check stand entrances, around to the video rental racks and past the photo department and then out the store exit without paying or attempting to pay for the vitamins. (RT 123-129.)

Lopez notified Randy Evans, another employee, and the two of them followed appellant outside the store. When they caught up to appellant, Lopez said, "Excuse me, can we have the pills?" Appellant did not respond and kept walking. Lopez asked him to return the pills several times. After the third request, appellant turned around, looked at her and then turned away and began running. (RT 129-130.)

By this time several other store employees had come outside. Several of the male employees chased appellant across the parking lot. At one point the appellant stopped and turned to face an employee, Carl Ortega. Appellant told Ortega that he had a knife, and swung his right hand at Ortega as if holding a knife.

Ortega stepped back, then saw there was no knife in appellant's hand. Appellant started running and Ortega again gave chase. Just before Ortega and another employee caught appellant, he threw the bottle of vitamins onto the ground. (RT 185-195.)

After a struggle, appellant was detained and brought back into the store. Banning Police Officers responded to the store to take custody of appellant. They searched him and found a hypodermic syringe hidden in his left sock. (RT 195-196, 234-239.)

ARGUMENT

I

THE PROSECUTOR COMMITTED PREJUDICIAL ERROR IN HIS ARGUMENT TO THE JURY

It is well settled that the right of trial by jury in criminal cases is secured by both the state and federal constitutions. (*People* v. *Trejo* (1990) 217 Cal.App.3d 1026, 1029.) It is also established in the decisional law that it is misconduct for a prosecuting attorney to make an adverse comment concerning a criminal defendant having exercised a constitutional right. (See, e.g., *Griffin* v. *California* (1965) 380 U.S. 609 [14 L.Ed.2d 106, 85 S.Ct. 1229] [comment on a defendant's failure to testify]; *People* v. *Crandell* (1988) 46 Cal.3d 833, 877-878 [comment on defendant's exercise of right to counsel upon arrest]; *People* v. *Eshelman* (1990) 225 Cal.App.3d 1513, 1514 [comment on defendant's silence to private party after being given warnings as to right to silence].)

In this case, the prosecutor commented upon appellant having exercised his right to a trial by jury. Near the beginning of his argument, the prosecutor reminded the jury that value of the property involved in the case was de minimis by the following comment.

> Why are we here? Why does a person fight a traffic ticket? Well, he may fight it because he doesn't believe he is guilty. He may also fight it because he thinks the fine is too high, because he thinks he will get a reduction or some *leniency if he pushes it to the maximum*. I disagree with that law. There is no way I'm going to pay that ticket. These are things you can't speculate on. The prosecutor must think he has a good case, that's why he pushed it this far. Or the defendant thinks he has a good case, that is why he pushed it this far. That is not something for you to speculate about.

(RT 266:25-267:6, emphasis added.)

Defense counsel did not contemporaneously object to this portion of the prosecution's argument. However, the prosecutor returned to this theme with a vengeance at the conclusion of his argument.

> Well, those are the two duties that you are here to perform, and you know *we're here today if you think about it because Mr. Riggs just kept on pushing, you know, he just kept on pushing*. He was asked -- first, he goes into the store where people are running a business trying to make a living. Young people, you know, making an hourly wage. It is not as if they're there to risk their life for $20 bottle of pills. And when he steals it and he walks out of the store he pushes them. They say, just come back, we don't want to get involved in this, but he keeps pushing them. *I'm going to violate the law, and I bet you if I push this envelope far enough you guys are going to let me go.*
>
> So what does he do? He runs and they chase him. So he says he has a knife and he spins around like he is going to slash them. Then what does he do when they asked him to come back to the store after they caught up to the guy? He won't cooperate. They have to put handcuffs on him and take him back to the store. Only at that point does he realize that their desire to be good employees and follow the law is stronger than his desire to disobey the law.
>
> We're in similar situation here as jurors. You are sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills like the employees could have blown it off. *It is kind of a test. He is pushing it to the limit. Maybe if I take it this far, maybe people out there won't think at this time is important and they won't vote guilty.*
>
> But it is important he is testing will the law be enforced? Will my

> lawlessness be tolerated by the society. And the answer to that question must be no, and the answer to the question of guilt in this case must be yes. Thank you, very much.

(RT 276:25-278:1, emphasis added.)

Defense counsel then voiced his objection to this line of argument. The trial court agreed that the argument was objectionable, stating:

> I think the last portion definitely has to be stricken, and I don't know if that will cure it, but we'll find out. The part that it is kind of a test, he is pushing it to the limit, maybe if I take it this far maybe people out there won't think at this time it is important and they won't find me guilty, *that portion has to be stricken at the very least and that may not cure it.*

(RT 280:7-13, emphasis added.)

The trial court then attempted to cure the error with an instruction to the jury.[2] Although the trial court attempted to cure the error, the misconduct was of such a

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[2]The trial court told the jury: "All right, ladies and gentlemen, before we have the defense counsel's closing argument I just want to make sure that nobody is led astray. There was a reference, actually the last paragraph of the argument was we're in similar situation as jurors. You're sitting as judges. Is your will to follow the law stronger than Mr. Rigg's will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills, like employees could have blown it off. ¶ If any of the jurors interpreted the following, anything after that, as meaning that the defendant should not or does not have a right to go to trial, period, that reference should not have been, I believe, it wasn't intended to mean that the defendant does not have a right to go to trial. But you are not to interpret that he did not have a right to go to trial, or the fact that he went to trial is any evidence of his guilt. As I say I don't think it was intended that way, but just if reading it I just want to make sure that you didn't take it that way. Okay, counsel, you may proceed." (RT 281:12-282:1.)

nature that the only effective way of curing it was the declaration of mistrial. And the trial court recognized that such may be the case.

A prosecutor is not merely an advocate for the People. "His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, . . ." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) Prejudicial misconduct arises when the prosecutor uses "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People* v. *Strickland* (1974) 11 Cal.3d 946, 955; *People* v. *Luparello* (1986) 187 Cal.App.3d 410, 420.)

It is axiomatic that the responsibility remains with the prosecution throughout trial, including closing argument, to seek justice, not convictions. "While he may strike hard blows, he is not at liberty to strike foul ones." (*Berger* v. *United States* (1935) 295 U.S. 78, 88; see also, *People* v. *Superior Court (Greer)* (1977) 19 Cal.3d 255.) It is error for a prosecutor to make derogatory remarks about the defendant in closing argument, if these remarks are not based on evidence adduced at trial. (See, e.g., *People* v. *Bandhauer* (1967) 66 Cal. 2d 524; *People* v. *Vienne* (1956) 142 Cal. App. 2d 172; *People* v. *Beyea* (1974) 38 Cal. App. 3d 176.)

In *People* v. *Fosselman* (1983) 33 Cal.3d 572, at page 580, the prosecution characterized the defendant as an "animal . . out to get somebody that morning" and the case was reversed. And, as stated in *People* v. *Sawyer* (1967) 256 Cal.App.2d 66:

> [W]e cannot condone the prosecutor's inflammatory characterization of defendant on the basis of the evidence in this case . . . nor can we approve of his statements of personal belief, based on purported facts not in evidence . . . we find similarly distressing the use of inadmissible character evidence.

(Id., at p. 77.)

Because the misconduct here allowed the jury to decide the issue of guilt or innocence on the basis of prejudice, the prosecutor fell short of the standard mandated by the California Supreme Court in *People* v. *Lyons* (1956) 47 Cal.2d 311, 318, where it was stated he must be the impartial "servant of the law." See also *Viereck* v. *United States* (1943) 318 U.S. 236, 248.

Misconduct has been committed during the closing argument portion of the trial in a variety of differing situations. See, for example *People* v. *Adams* (1939) 14 Cal.2d 154, 160-162 (child molestation case; misconduct to refer to two other then notorious cases and state, "render a verdict such as you will be proud of"); *People* v. *Mendoza* (1974) 37 Cal.App.3d 717, 727 (child molestation case; misconduct for prosecutor to ask jury "to take Mr. Mendoza off the streets"); *People* v. *Jones* (1970) 7 Cal.App.3d 358, 363 [prosecutorial remarks about dangers of the defendant to the jurors' sons "were blatantly uncalled for, were a crude appeal to the fears and emotions of the jurors, and constituted misconduct"]; *People* v. *Talle* (1952) 111 Cal.App.2d 650, 673-678 [murder case; prosecutorial misconduct to refer to the defendant as a man of great wealth, and to speak of the necessity to "avenge the cruel death of an innocent girl at the hands of . . . a beast"].

The argument of the prosecutor denied appellant his due process right to a fair trial. It was "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People* v. *Gionis* (1995) 9 Cal.4th 1196, 1214.) The argument, by commenting on appellant having exercised his constitutional right to a trial by jury, violated appellant's rights to a fair trial and a reliable verdict and due process of law under the Sixth and Fourteenth Amendments to the federal Constitution and under article I, section 7 of the California Constitution. When error implicates a federal

constitutional right, such error must be scrutinized under the harmless-beyond-reasonable doubt standard of *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 710, 87 S.Ct. 824], in order to determine whether or not the error was in fact reversible. Under that standard of review, it cannot be said that the prosecutorial misconduct was harmless beyond a reasonable doubt and appellant's convictions must be reversed.

Moreover, even if viewed under the harmless error standard set forth in *People* v. *Watson* (1946) 46 Cal.2d 818, 836, the conduct of the prosecutor was prejudicial and a different result was probable had the jury not heard the prosecutor characterize an exercise of appellant's constitutional right as an attempt to push the jury to the limit over a relatively innocuous offense. ". . . . maybe people out there won't think at this time is important and they won't vote guilty. (RT 277:22-24.)

II

APPELLANT'S LIFE SENTENCE
CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT
UNDER BOTH THE CALIFORNIA AND FEDERAL
CONSTITUTIONS

"The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. [Citation.] Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) A sentence that is "grossly disproportionate" to the offense for which it is imposed, violates both the California and United States constitutional prohibitions against cruel and unusual punishment. (*People* v. *Dillon* (1983) 34 Cal.3d 441, 478; *Gregg* v. *Georgia* (1976) 428 U.S. 153, 173; *Coker* v. *Georgia* (1977) 433 U.S. 584; U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)[3]

In *Lynch*, the Supreme Court set forth three techniques for evaluating a punishment to determine whether it is disproportionate. The court must (1) examine the nature of the offense and/or the offender, (2) compare the challenged penalty with punishments prescribed in California for other, more-serious offenses, and (3) compare the challenged penalty with punishments prescribed for the same offense in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at p. 425-427.)

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[3]The federal circuit courts continue to apply a gross disproportionality test in determining Eighth Amendment challenges to punishments imposed for non-capital offenses. (See, e.g., *Cacoperdo* v. *Demosthenes* (9th Cir. 1994) 37 F.3d 504, 507-508; *United States* v. *Munoz* (1st Cir. 1994) 36 F.3d 1229, 1239; *United States* v. *Cupa-Guilen* (9th Cir. 1994) 34 F.3d 86, 864-865; *United States* v. *Lanier* (6th Cir. 1994) 33 F.3d 639, 665; *United States* v. *Frieberger* (8th Cir. 1994) 28 F.3d 916, 920; *United States* v. *Fisher* (5th Cir. 1994) 22 F.3d 574, 579-580; *United States* v. *Angulo-Lopez* (10th Cir. 1993) 7 F.3d 1506, 1510; *United States* v. *Sarbello* (3d Cir. 1993) 985 F.2d 716, 724; *McGruder* v. *Puckett* (5th Cir. 1992) 954 F.2d 313, 316-317.)

For a holding of disproportionality, the court need not find the punishment disproportionate in all three respects. Rather, a finding of disproportionality based upon any of the *Lynch* criteria will suffice. (*People* v. *Dillon*, *supra*, 34 Cal.3d 441, 487 fn. 38; *In re Rodriguez* (1975) 14 Cal.3d 639, 656.) This does not mean, however, that each of the techniques must be considered in total isolation from the others. When the Court stated, in *Lynch*, that a statute's disparity with punishments in other states "is a *further* measure of its excessiveness" (*In re Lynch*, *supra*, 8 Cal.3d at p. 427, emphasis added), the suggestion is that the measure of disproportionality found in applying the several techniques would be cumulative.

A. <u>The penalty is disproportionate as applied to this offense and this offender</u>.

In *People* v. *Dillon*, *supra*, 34 Cal.3d 441, the California Supreme Court found that, under the facts of its case, strict application of the felony-murder rule violated the prohibition against cruel and unusual punishment. In reaching this result, the Court looked to "'the nature of the offense and/or the offender, *with particular regard to the degree of danger both present to society*.'" (*Id.*, at p. 479, emphasis added, quoting *In re Lynch*, *supra*, 8 Cal.3d at p. 425.)

With regard to the "nature of the offense," courts are to consider "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his act." (*People* v. *Dillon*, *supra*, 34 Cal.3d at p. 479.) As for the "nature of the offender," the appropriate inquiry is "whether the punishment is grossly disproportionate to defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Proper application of this analysis to the present case reveals that appellant's 25 years to life sentence is "grossly disproportionate", both to the severity of his crimes and to the degree of danger he poses to society. In the present case, appellant was convicted of the theft of a bottle of vitamins. Yet, appellant has been subjected to a life sentence for this offense. Such an offense is neither a violent nor a serious felony. (§§ 667.5, subd. (c), 1192.7, subd. (c).)

Petty theft is not among those offenses considered most dangerous to society. It is neither serious nor violent. An examination of the "totality of the circumstances surrounding the commission of the offense" also underscores the nonserious, nonviolent nature of the offenses. Appellant had no weapon, although in his panic to avoid apprehension he feigned having a knife.

While appellant's prior felony convictions arguably support some increased punishment for the current offense, the extreme punishment imposed cannot be rationalized under any credible system of criminal justice. (Cf. *In re Lynch*, *supra*, 8 Cal.3d at p. 425; *Faulkner* v. *State* (Alaska 1968) 445 P.2d 815, 818-819 [holding unconstitutionally disproportionate a 36-year sentence imposed on a 46-year-old man with a prior criminal record for a single spree of passing bad checks in one single day].)

B. <u>The penalty is disproportionate when compared with punishment prescribed in California for more serious offenses</u>.

In the present case, the Legislature has already determined that a conviction of petty theft with a prior conviction of robbery is not among the state's serious or violent felonies. (See §§ 667.5, subd. (b), 1192.7, subd. (c).) Under the Three Strikes Law, appellant is not eligible for parole until he serves 20 years, i.e., 80% of

25 years. (§ 667, subd. (c)(5).) By contrast, someone who commits a cold-blooded premeditated murder with a deadly weapon receives a maximum sentence of 26 years to life (§§ 190, subd. (a), and 12022, subd. (b)), and is eligible for parole in 17 years 4 months. (*In re Oluwa* (1989) 207 Cal.App.3d 439, 444-447.)

The question then becomes whether it is cruel or unusual to impose a sentence of 25 years to life, without parole eligibility for 20 years, in this case for having committed a petty theft. There is no doubt that the answer is yes. A person who commits premeditated murder with a deadly weapon is eligible for parole for that offense two years and eight months sooner than appellant will be for this offense. Under no principled or defensible analysis can appellant be viewed as having posed a greater danger to society than such a murderer. As stated in *Dillon*, "a comparison of the challenged penalty with those prescribed in the same jurisdiction for more-serious crimes . . . is particularly striking when a more serious crime is punished less severely than the offense in question, ..." (*People* v. *Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38 [emphasis omitted]; *In re Foss* (1974) 10 Cal.3d 910, 925-926.)

Application of the Three Strikes Law to persons convicted of relatively minor felonies only widens the disparity. Some trial courts have declined to apply the Three Strikes Law to third strikers convicted of such offenses and other felonies which have the option of being treated as misdemeanors under the provisions of section 17. (See, e.g., *People* v. *Trausch* (1995) 36 Cal.App.4th 1239, [trial court elected to reduce burglary involving theft of a cake to a misdemeanor, in order to avoid 25 years to life sentence otherwise mandated for third strike defendant; ruling affirmed on appeal], and *People* v. *Vessell* (1995) 36 Cal.App. 285 [trial court reduced the offense of inflicting

corporal injury upon a cohabiting person to a misdemeanor and granted probation].)

C. The penalty is disproportionate when compared with recidivist punishments in other jurisdictions.

Unlike the California Three Strikes Law, which is applicable on commission of any type of current felony, including extremely minor felonies like this one, the habitual offender provisions in most other states require that the current felony be of an aggravated type. (See Ala. Code, §§ 13-A-5-6, 13A-5-9; Del. Code Ann., tit. 11, § 4214; Ill. Ann. Stat., ch. 720, § 33B-1, ch. 730, § 5-8-1; Ind. Code, § 35-50-2-8.5; Miss. Code Ann., § 99-19-83; S.C. Code Ann., §§ 17-25-45, 16-1-60; Wyo. Stat., § 6-10-201.)

Moreover, some states' recidivist laws apply only where the current felony is of an aggravated type. (See, e.g., Ill. Ann. Stat., ch. 720, § 5/33B-1, ch. 730, § 5/5-8-1; Ky. Rev. Stats. Ann., § 532.080; Md. Code Ann., art. 27, § 643B; Ore. Rev. Stats., § 161.725-161.737; Pa. Cons. Stats. Ann., tit. 42, § 9714; S.C. Code Ann., §§ 17-25-45; Utah Code Ann., § 76-3-203.5; Va. Code, § 19.2-297.1; Wyo. Stat., § 6-10-201.) Although the West Virginia statute does not specifically so provide, that state's supreme court has held the statute inapplicable to certain minor felonies. (*Wanstreet* v. *Bordenkircher* (1981) 166 W.Va. 524 [276 S.E.2d 205, 207, 214].)

A comparison of the California Three Strikes Law with recidivist statutes in other states shows that, while the California law applies the same penalty to any current felony, regardless of whether it is major or extremely minor, many other states provide for varying increases in penalty, greater increases being imposed where the current offense is more serious and lesser increases where it is less serious. (See, e.g., Ala. Code, § 13A-5-9; Alaska Stats., § 12.55.155(a); Ariz. Rev. Stats., § 13-604; Ark. Code Ann., § 5-4-501; Colo. Rev. Stats., § 16-13-101; Conn.

Gen. Stats., § 53a-40; Del. Code Ann., tit. 11, § 4214; Fla. Stats. Ann., § 775.084; Ga. Code Ann., § 17-10-7; Hawaii Rev. Stats., §§ 706-606.5, 706-661; Ind. Stats. Ann., §§ 35-50-2-8, 35-50-2-8.5; La. Rev. Stats. Ann., § 15:529.1; Mich. Comp. Laws Ann., §§ 769.10-769.12 (Mich. Stats. Ann., tit. 28, §§ 1082-1084); Miss. Code Ann., § 99-19-83; N.J. Stats. Ann., §§ 2C:44-3, 2C:43-7; N.Y. Pen. Law, §§ 70.00-70.10; N.D. Cent. Code, § 12.1-32-09.)

Tennessee's Three Strikes statute, which subjects the defendant to a sentence of life without possibility of parole, is limited to repeat violent offenders, and the court must find beyond a reasonable doubt that the defendant is a repeat violent offender. (Tenn. Code Ann., § 40-35-120.) Other recidivist statutes provide complex formulas for determining punishment, based upon the class of the current felony and the classes of the priors. (§§ 40-35-106, 40-35-107, 40-35-108.) With two to four qualifying priors, and a current felony of the highest class, the sentence would range from 25 to 40 years. With more than four qualifying priors, and a current felony of the highest class, the sentence would range from 40 to 60 years. (§ 40-35-112.)

In most other states that permit enhancement on the commission of a current felony of any type, there are limitations on the application of the statute that are absent in California. Thus, in Nebraska and Rhode Island, the first two convictions must have included a prison commitment (Neb. Rev. Stat., § 29-2221; R.I. Gen. Laws, § 12-19-21), and in Vermont, the statute applies only after conviction of four felonies (Vt. Stat. Ann., tit. 13, § 11).

Some states' recidivist statutes, which appear on their face to be as draconian as California's, in actual practice, are not enforced as rigidly as is California's. In Idaho, a third conviction of any felony requires a prison term of not less than five years, and the term may extend to life. (Idaho Code, § 19-2514.) However, that statute

differs from California's because the Idaho sentencing courts have wide discretion within those bounds (*State* v. *McPhie* (1983) 104 Idaho 652 [662 P.2d 233, 237]; *State* v. *Gauna* (1989) 117 Idaho 83 [785 P.2d 647, 652-653]), whereas the California sentencing courts have no function but to mathematically compute the defendant's sentence. More important, application of the recidivist statute is not mandatory; the Idaho court can sentence the defendant for the last-committed crime only, notwithstanding the prior record. (*State* v. *Holton* (App. 1991) 120 Idaho 112 [813 P.2d 923, 924].) Further, unlike the California statute, under which consecutive sentences are mandatory (§ 667, subd. (c)(6)-(8)), the Idaho courts retain discretion to sentence either consecutively or concurrently. (*State* v. *Brandt* (App. 1986) 110 Idaho 341 [715 P.2d 1011, 1016].) Finally, whereas 80 percent of the California minimum sentence must be served, an Idaho defendant may be considered for parole after service of one-third of the sentence. (*State* v. *Harrison* (App. 1985) 108 Idaho 324 [699 P.2d 30, 31].)

In Washington, the statute provides a minimum ten-year sentence for a defendant with a current felony conviction and a prior felony or two prior misdemeanor convictions involving fraud, and a life sentence where the defendant has two prior felonies or four prior misdemeanors. (Wash. Rev. Code Ann., § 9.92.090.)[4] However, there is parole eligibility after 15 years. (§ 9.95.040.) Further, unlike California (§ 667, subds. (f), (g)), Washington prosecutors have discretionary charging power and may

[4]Another statute, adopted by initiative, sets forth reasons for imposing a sentence of life without the possibility of parole on three-time "most serious offenders" (Pen. Code, § 9.94A.392), and "most serious offense" is defined (Pen. Code, § 9.94A.030(21)). However, appellant's research has failed to unearth a recidivist statute actually implementing that provision.

consider a wide range of factors in determining whether to file charges, as long as the exercise of the power is not arbitrary or capricious or based upon invidious standards. (*State* v. *Ross* (1981) 30 Wash.App. 324 [634 P.2d 887, 890].) Indeed, a statute providing that a habitual criminal allegation "shall" be filed in certain cases is directory, not mandatory. Otherwise, it would violate the defendant's due process rights. (*State* v. *Rowe* (1980) 93 Wash.2d 277 [609 P.2d 1348, 1351].)

In West Virginia, the statute provides a life sentence for a current felony conviction with two felony priors. (W.Va. Code, § 61-11-18.) However, the prosecutor has the power to exercise selectivity in enforcement, as long as the choice is not based upon an unjustifiable standard such as race or religion. (*Oyler* v. *Bowles* (1962) 368 U.S. 448, 453 [7 L.Ed.2d 446, 82 S.Ct. 501].)

Of the states that permit enhancement on the commission of a current felony of any type, there are limitations on the application of the statute that are absent in California. Thus, some states provide washout periods, e.g., Florida (Fla. Stats. Ann., § 775.084), Kentucky (Ky Rev. Stats. Ann., § 532.080), Louisiana (La. Rev. Stats. Ann., § 15:529.1), Montana (Mont. Code Ann., § 46-18-502), Oklahoma. (Okla. Stats. Ann., tit. 21, § 51), Utah (Utah Code Ann., § 76-3-203.5), Wisconsin (Wis. Stats. Ann., §§ 939.62). Others require that the prior convictions must have included a prison commitment, e.g. Nebraska and Rhode Island. (Neb. Rev. Stat., § 29-2221; R.I. Gen. Laws, § 12-19-21.)

Other states with potential life sentences grant the trial court the power to set a sentence of a determinate term of years. Some provide no minimum, e.g., Delaware (Del. Code Ann., tit. 11, § 4214), Florida (Fla. Stats. Ann., § 775.084), and Vermont (Vt. Stats. Ann., tit. 13, § 11). Some provide a minimum of ten years, e.g., Arkansas (Ark. Code Ann., § 5-4-501.) (Montana and Nebraska provide

a ten-year minimum with a putative life top.)[5] Some states with a life top provide for parole eligibility after ten years, e.g., Alabama (Ala. Code, § 15-22-28(e)) and Nevada (Nev. Rev. Stats. Ann., § 207.010(2)).

Mississippi has two recidivist statutes. One provides that a current conviction with two priors requires that the defendant be sentenced to the maximum term of the range provided. (Miss. Code Ann., § 99-19-81.) The other provides that, if any of the prior felonies are a "crime of violence," the sentence is life without the possibility of parole. (Miss. Code Ann., § 99-19-83; *McLamb* v. *State* (Miss. 1984) 456 So.2d 743, 746.) "Crime of violence" is not defined, but cases have held that robbery, attempted robbery, attempted rape, and attempt to commit sodomy on a child are included as crimes of violence. (*Magee* v. *State* (Miss. 1989) 542 So.2d 228; *Ashley* v. *State* (Miss. 1989) 538 So.2d 1181; *McQueen* v. *State* (Miss. 1985) 473 So.2d 971; *Bandy* v. *State* (Miss. 1986) 495 So.2d 486.) Unlike the California statute, both Mississippi statutes require that the charges be separately brought, that they arise out of separate incidents at different times, and that the defendant serve separate terms of at least one year.

In South Dakota, with three or more priors, at least one of which was for a crime of violence, sentence on the current felony is life. (S.D. Cod. Laws, §§ 22-7-8, 22-6-1.) Crimes of violence are similar to California's violent felonies. (§ 22-1-2(9).) However, the sentence may be commuted to a term of years, in which event the defendant is entitled to good conduct credits (§ 24-5-1) and is eligible for parole (§ 24-15-5).

In Texas, with two or more priors, the sentence is life or a term between 25 and 99 years. However, the second

[5]In Montana, the court may impose a sentence from 10 to 100 years (Mont. Code Ann. § 46-18-502), in Nebraska from 10 to 60 years (Neb. Rev. Stats. § 29-2221).

prior must be for an offense that occurred after the first prior became final; and the court, of course, has the power to impose a minimum term of 25 years. (Tex. Pen. Code, § 12.42(d).) Moreover, the court retains power to impose a misdemeanor sentence for lesser felonies. (§ Tex. Pen. Code, § 12.44.)

In sum, other than California, there appears to be no state with a recidivist statute that requires such mandatory application and lengthy imprisonment, regardless of any circumstances in mitigation, where the current offense need not be a violent offense. Texas appears to be the closest. However, even if there were several other states with measures as draconian as California's Three Strikes Law, that would not save the California statute. As stated in *Lynch*, "if the challenged penalty is found to exceed the punishments decreed for the offense *in a significant number of those jurisdictions*, the disparity is a further measure of its excessiveness." (*In re Lynch*, *supra*, 8 Cal.3d at p. 427, emphasis added.)

Under the particular facts of this case, the life term *mandated* by the Three Strikes Law is "grossly disproportionate" to appellant's culpability. The case must be remanded for re-sentencing under provisions of the law that do not include treating appellant as a person with two prior strike convictions.

III

THE TRIAL COURT ERRED IN ITS DETERMINATION OF PRESENTENCE CUSTODY CONDUCT CREDITS

In this case the trial court proceeded on the assumption that the provisions of Penal Code section 2933.1 limited presentence conduct credits to 15 percent. Defense counsel concurred in this assessment. (RT 334.) Penal Code section 2933:1 does limit conduct credits to 15 percent for those persons convicted of certain violent felonies enumerated in Penal Code section 667.5. Among the listing of violent felonies in Penal Code section 667.5 is any "felony punishable by death of imprisonment in the state prison for life." (Pen. Code, § 667.5, subd. (c)(7).

Appellant contends that subdivision (c)(7) refers to a felony that is punishable by death or life imprisonment without regard increased punishment based upon recidivism. There are a number of offenses which call for a life sentence, without regard to the defendant's prior record, that are not specifically referred to in Penal Code section 667.5. These include violations of following Penal Code sections: 37, subdivision (a) [treason]; 76, subdivision (a) [threatening the life of certain public officials], 128 [perjury in certain circumstances], 139, subdivision (b) [falsification of evidence in certain circumstances], 218 and 219 [attempt to derail a train], 273, subdivision (a) [certain assaults on children under the age of eight years], and 451.5, subdivision (b) [arson under certain circumstances]. It is to these offense that subdivision (c)(7) of Penal code section 667.5 makes reference not to every defendant sentenced as third striker.

Appellant has not waived this error by his failure to object before the trial court in that denial of these conduct credits amounted to an unauthorized sentence. Penal Code section 2900.5, subdivision (d), provides, in part: "It shall be the duty of the court imposing the sentence to

determine . . . the total number of days to be credited . . . [which shall] be contained in the abstract of judgment . . . ." California Rules of Court, rule 472, makes similar provisions. "At the time of sentencing, the court shall cause to be recorded on the judgment or commitment the total time in custody to be credited upon the sentence under Penal Code section 2900.5." "The ... effect of the court's failure to comply with [section 2900.5, subdivision (d)] [is] to render its initial finding and resulting sentence a nullity." (*People* v. *Brite* (1983) 139 Cal.App.3d 950, 955.)

Nor was the error waived by defense counsel concurrence in the trial court's view that Penal Code section 2933.1 applied in this case. Defense counsel's concurrence cannot validate an otherwise unauthorized sentence. (*People* v. *Scott* (1994) 9 Cal.4th 331, 354; *People* v. *Middleton* (1997) 52 Cal.App.4th 19, 36.) And, even if such an error could be waived, it was ineffective assistance of counsel to agree. Accordingly, if this Court views the error as having been waived, the sentence should still be vacated and the matter remanded for another sentencing hearing. There could have been no tactical reason for defense counsel to agree that his client should receive less presentence custody credits that to which he was entitled and the issue can be dealt with on direct appeal.

Appellant must be awarded 204 days of presentence custody conduct credit, rather than the 61 days awarded by the trial court. Accordingly, the abstract of judgment should be modified to show 204 days for presentence conduct credits. (*People* v. *Smith* (1989) 211 Cal.App.3d 523, 527.)

CONCLUSION

The prosecuting attorney engaged in prejudicial misconduct which denied appellant a fair trial and which requires that the convictions be reversed.

Alternatively, appellant's life sentence constitutes cruel and unusual punishment under both the California and the United States Constitutions. Appellant should be resentenced under provisions of the law that do not provide for a 25 years to life sentence.

The abstract of judgment should be modified to show 204 days for presentence conduct credits.

Dated: May 19, 1997

Respectfully submitted,

JAMES L. CROWDER
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By appointment of Court
of Appeal under the
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CASE NO.: E019488

DECLARATION OF SERVICE

I, undersigned say: I am over 18 years of age, employed in the County of Santa Barbara, California, in which county the with-in mentioned delivery occurred, and not a party to the subject cause. My business address is 140 East Figueroa Street, Santa Barbara, California. I served the **Appellant's Opening Brief** of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Santa Barbara, California, on May 19, 1997.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 19, 1997, at Santa Barbara, California.

KIM DEMPSEY